

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





ORIGINAL

**74-1432**

B  
P/S

**United States Court of Appeals**

**For the Second Circuit**

STERLING NATIONAL BANK AND  
TRUST CO. OF NEW YORK,

*Plaintiff-Appellee,*

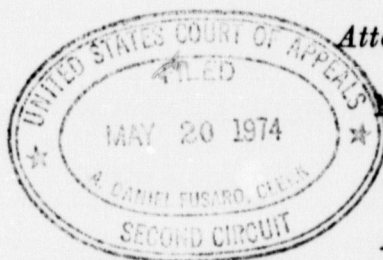
*against*

FIDELITY MORTGAGE INVESTORS,

*Defendant-Appellant.*

**On Appeal from the United States District Court  
for the Southern District of New York**

**JOINT APPENDIX**



LORD, DAY & LORD

*Attorneys for Defendant-Appellant*

25 Broadway

New York, New York 10004

(212) 344-8480

HARRY GURAHIAN

*Attorney for Plaintiff-Appellee*

540 Madison Avenue

New York, New York 10022

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PAGINATION AS IN ORIGINAL COPY



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CPAGE #2)

3

74-28-743

DATE	PROCEEDINGS	Date Order Judgment N
Jan 9-74	Filed Petition for Removal from Supreme Court State & County of New York.	1
Jan 9-74	Filed Bond # 8057-74-J4 in the amount of \$500.00, Federal Insurance Company.	2
Jan.11-74	Filed def't's notice of petition for removal from Supreme Court State & County of New York.	3
Jan. 17-74	Filed default Judgment # 74-081--ordered that pl'tff. have judgment against def't. for the liquidated amount of \$ 1,600,000.00 together with interest as indicated amounting to \$ 31,963.89 with costs and disbursements in the amount of \$20.00 amounting in all to the sum of \$ 1,631,983.89 Clerk. (m/n)	4
Jan.21-74	Filed copies of papers filed in the Supreme Court, N.Y. County, prior to the timely removal of the action to this Court pursuant to Rule 3 (c)	5
Jan.23-74	Filed def't's affdvt. of Michael J. Murphy and show cause order setting aside the default judgment entered by the Clerk of the Court on 1-17-74. Ret. 1-29-74 at 4:30 in the afternoon.	6
Jan.25-74	Filed affdvt. of Kerry B. Fitzpatrick in support of def'ts application to set aside the default judgment.	7
Jan.25-74	Filed def't's memorandum in support of application to set aside default judgment.	8
Jan.29-74	Filed def't's undertaking to stay execution in the sum of \$10,000.-Federal Insurance Company.	9
Jan.31-74	Filed pl'tff's affdvt. of Harry Gurahian in opposition to def't's application to have vacated a default judgment.	10
Jan.31-74	Filed order that the default and default judgment entered by the Clerk of the Court on 1-17-74 be and hereby are set aside and vacated and as indicated. FRANKEL, J. (mailed notice)	11
Feb 4-74	Filed ANSWER	12 LD&L
Feb 4-74	Filed def't's notice to take deposition of Joseph A. Sciarillo on 3-4-74.	13
Feb13-74	Filed def'ts statement and affidavit in opposition to pl'tffs motion for summary judgment	14
Feb13-74	Filed def'ts Affidavit. Notice of Cross Motion for an order purs to Rule 12B of the FRCP. dismissing the action herein as indicated rtble. 2-15-74.	15
Feb 13-74	Filed memorandum of law by def't in support of motion to dismiss and in opposition to pl'tffs motion for summary judgment.	16
Feb.14-74	Filed ANSWER	17 LD&L
Feb15-74	Filed def'ts supplemental affidavit in opposition to to summary judgment and to certain matters raised for the first time in pl'tffs reply papers served on this office etc. as indicated.	18
Feb.28-74	Filed pl'tff's affdvt. of John J. Fowler and notice of motion for an order granting summary judgment in favor of pl'tff. Ret. 2-15-74 (rec'd 2-28-74)	19
Feb. 28-74	Filed pl'tff's memorandum of law (rec'd 2-28-74)	20
Feb. 28-74	Filed pl'tff's reply memorandum of law (rec'd 2-28-74)	21
Feb. 28-74	Filed pl'tff's affdvt. by Harry Gurahian in support of pl'tff's motion for summary judgment (rec's 2-28-74)	22
Feb. 27-74	Filed memorandum-Opinion # 40403- def't. purports to find in the motion for a default judgment grounds for a chilling theory of "material alteration" which, def't. claims, should deprive pl'tff. of repayment of \$ 1,600,000 unquestionably due and owing. As anybody could have predicted, the case was not permitted to go off by default. Whether or not def't. was technically right (or, as seems more likely, was mainly seeking delay) in its refusal to file an answer, the court allowed time to answer. The most that might conceivably be open for debate is the rate of post-maturity interest. Upon the foregoing grounds, pl'tff's motion for summary judgment must be granted and def't's cross-motion must be denied. Counsel has been directed to prepare a judgment which will be signed and filed along with this memorandum. FRANKEL, J. (m/n)	23

COPIED TO FILE # ONLY COPY AVAILABLE



DATE

PROCEEDINGS

Feb. 27-74 Filed Judgment # 74,219--adjudged and decreed that Sterling National Bank & Trust Company of New York have judgment against Fidelity Mortgage Investors in the sum of \$ 1,600,000.00 together with interest in the sum of \$ 29,193.00 making a total of \$ 1,629,193.00 FRANKEL, J.

Judgment entered 2-28-74. Clerk - entered 3-1-74. (mailed notices)

March 5-74 Filed deft's notice of appeal from final judgment entered 2-28-74.

Entered 3-6-74. Mailed copy to: Harry Gurahian, Esq.

March 5-74 Filed deft's Supersedeas Bond in the sum of \$ 1,808,654 23

Firemen's Insurance Co of Newark, N.J.

March 8-74 Filed deft's notice of filing true copy of Supersedeas Bond.

March 21-74 Filed plttf's memorandum of law

*off set and def. file*



SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

S U M M O N S

STERLING NATIONAL BANK & TRUST COMPANY OF  
NEW YORK,

Plaintiff,

-against-

FIDELITY MORTGAGE INVESTORS,

Defendant.

\* Plaintiff designates  
: New York County as  
\* place of trial.  
:  
\* The basis of the  
: venue is plaintiff's  
\* residence.  
:  
\* Plaintiff resides at  
: 540 Madison Avenue  
\* New York, New York  
10022

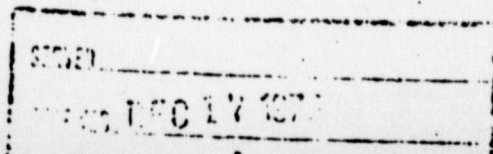
To The Above Named Defendant:

You are hereby SUMMONED to answer the motion for summary judgment in lieu of complaint in this action and to serve your answering papers on the plaintiff's attorney at least five (5) days prior to the return day as stated in the notice of motion attached hereto and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated: December 5, 1973

HARRY GITANILAN  
Attorney for Plaintiff  
Office & P.O. Address  
540 Madison Avenue  
New York, New York 10022  
(212) 752-6002

Defendant's Address  
FIDELITY MORTGAGE INVESTORS  
645 Riverside Avenue  
Jacksonville, Florida



SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

----- -x  
:  
STERLING NATIONAL BANK & TRUST COMPANY \*  
OF NEW YORK, :  
:  
Plaintiff, :  
:  
-against- : NOTICE OF ACTION  
:  
FIDELITY MORTGAGE INVESTORS, :  
:  
Defendant. :  
:  
----- -x

S I R:

PLEASE TAKE NOTICE, that pursuant to Section 3213 of the Civil Practice Law and Rules, and upon the affidavit of JOHN J. FENNER, JR., duly sworn to the 5th day of December, 1973 and upon the summons dated December 5, 1973, the undersigned will move this Court at Spec. Term Extl at the Courthouse, 60 Centre Street, Borough of Manhattan, City and State of New York on the 14th day of January 1974, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order granting summary judgment in lieu of complaint in favor of plaintiff and against defendant in the sum of \$1,614,103.00 with interest on the sum of \$1,600,000.00 at the rate of 9 1/4% per annum computed from December 5, 1973 together with the costs and disbursements of this action on the ground that the cause of action asserted herein is based upon an instrument for the payment of money only, to wit, a promissory



granting plaintiff such other and further relief as to this  
Court may seem just and proper.

5 a

PLEASE TAKE FURTHER NOTICE, that pursuant to Rule  
2214 (b) CPLR affidavits to be used in answering this motion are  
required to be served on the undersigned at least five days before  
the return date of this motion.

Dated: New York, New York  
December 5, 1973

Yours, etc.

HARRY GURANLEN  
Attorney for Plaintiff  
Office & P.O. Address  
540 Madison Avenue  
New York, New York 10022  
(212) 752-3292

TO: Fidelity Mortgage Investors  
645 Riverside Avenue  
Jacksonville, Florida

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

----- -x  
:  
STERLING NATIONAL BANK & TRUST COMPANY \*  
OF NEW YORK, :  
:  
Plaintiff, \*  
:  
-against- :  
:  
FIDELITY MORTGAGE INVESTORS, \*  
:  
Defendant. \*  
----- -x

STATE OF NEW YORK )  
: ss.:  
COUNTY OF NEW YORK )

JOHN J. FOWLER, JR., being duly sworn deposes and  
says:

1. That he is an Executive Vice President of Sterling National Bank & Trust Company of New York and as such is fully familiar with all the facts and circumstances hereinafter set forth. Plaintiff is a national banking association organized under the laws of the United States of America.
2. That upon information and belief defendant is a trust duly organized and existing under the laws of the State of Massachusetts.
3. That heretofore and on or about August 17, 1973 defendant FIDELITY MORTGAGE INVESTORS duly made, executed and delivered its promissory note in writing dated said date wherein and whereby it promised to pay to the order of Sterling National



a part hereof and marked Exhibit A as if fully and at length set forth herein.

4. That said note was delivered by defendant FIDELITY MORTGAGE INVESTORS to plaintiff STERLING NATIONAL BANK & TRUST COMPANY OF NEW YORK at plaintiff's place of business in the City of New York,

5. That defendant FIDELITY MORTGAGE INVESTORS transacted business within the City and State of New York in person or through an agent and the cause of action sued upon herein arose therefrom.

6. That plaintiff is the owner and holder of the note sued upon and the original note is in plaintiff's possession.

7. That said note was duly presented for payment on November 7, 1973 and payment thereof was duly demanded but refused.

8. That no part of said note has been paid except the sum of \$400,000.00 which was paid on December 4, 1973 and there is now due and owing on said note from defendant to plaintiff the sum of \$1,600,000.00 together with interest as hereinafter set forth.

9. That interest was payable on said note at the rate of 9 1/4% per annum and there is now due and owing interest accrued to December 5, 1973 in the sum of \$14,103.33.

10. That by reason of the foregoing, there is now due and owing the sum of \$1,614,103.33 together with interest on the sum of \$1,600,000.00 computed at the rate of 9 1/4% per annum from December 5, 1973 a part of which has been paid

although duly demanded.

11. Deponent believes that there is no defense to this action and that fact of no defense is clear, from the foregoing.

WHEREFORE, deponent respectfully prays for summary judgment in favor of plaintiff and against defendant in the sum of \$1,614,103.33 together with interest on the sum of \$1,600,000.00 at the rate of 9 1/4% per annum computed from December 5, 1973 together with the costs and disbursements of this action and for such other and further relief as to this Court may seem just and proper.

/S/  
JOHN J. FOWLER, JR.

Sworn to before me this

5th day of December, 1973

/S/  
Notary Public

Notary Public  
City of New York  
Commission Expires March 1, 1974

27,750

\$ 2,000,000.00 Boston, Massachusetts August

On November 7, 1973

order of • \*\*\*\*Sterling National Bank & Trust

• \*\*\*\*Two Million and No/100\*\*\*\*

at the New York office of Payee



91/4 090-84255 54

11/7/73

By

By

THE NAME FIDELITY MORTGAGE INVESTORS IS THE DESIGNATION OF THE TRUSTEES FOR  
FIDELITY, AS AMENDED AND RESTATED, AND ALL PERSONS DEALING WITH FIDELITY MORTGAGE  
THE ENFORCEMENT OF ANY CLAIMS AGAINST FIDELITY MORTGAGE INVESTORS AS NEITHER  
PERSONAL LIABILITY FOR OBLIGATIONS ENTERED INTO ON BEHALF OF FIDELITY MORTGAGE

FMI-00

513.8888



*PAID*

st 17, 19 73 No. 432

....., for value received, we promise to pay to the  
Company

..... DOLLARS

Fidelity Mortgage Investors

*K. B. Fitzpatrick* *ny*

Authorized Signature

*For V. Wayne*

Authorized Signature

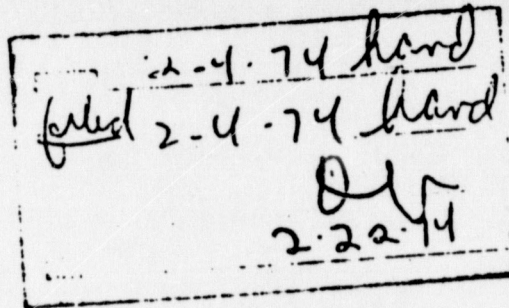
IN THE TIME BEING UNDER A DECLARATION OF TRUST DATED MAY 29,  
MORTGAGE INVESTORS MUST LOOK SOLELY TO THE TRUST PROPERTY FOR  
THEIR THE TRUSTEES, OFFICERS, AGENTS OR SHAREHOLDERS ASSUME ANY  
MORTGAGE INVESTORS

(Hold-out)

26



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



----- x  
STERLING NATIONAL BANK AND  
TRUST COMPANY OF NEW YORK,

Plaintiff,

-against-

FIDELITY MORTGAGE INVESTORS,

Defendant.  
----- x

ANSWER

74 CIV 148  
(MEF)

DEFENDANT DEMANDS A  
TRIAL BY JURY

Defendant Fidelity Mortgage Investors by its attorneys  
Lord, Day & Lord, for its answer herein, alleges:

1. Denies knowledge or information sufficient to form  
a belief as to the truth of the allegations contained in  
paragraphs 1, 6 and 11 of the affidavit of John J. Fowler,  
sworn to on December 5, 1973 (the "Fowler affidavit").

2. Denies the allegations contained in paragraphs 4,  
5, 9 and 10 of the Fowler affidavit.

3. Admits the allegations of paragraph 3 of the  
Fowler affidavit, except that it denies that the copy of the  
note annexed to the Fowler affidavit is a true copy of the  
note executed by the plaintiff herein.

4. Admits the allegations of paragraph 7 of the  
Fowler affidavit, except that it denies that said note was  
presented.

5. Denies the allegations of paragraph 8 of the  
Fowler affidavit, except that it admits that no part of the  
note has been paid except the sum of \$400,000.

FIRST AFFIRMATIVE DEFENSE

6. Repeats and realleges with the same force and effect as if more fully set forth herein, paragraphs "1" to "5" above.

7. Upon information and belief, after the delivery of said note, it was materially altered by the plaintiff, without the knowledge or consent of the defendant, by the entry on the face of the note of the term "9-1/4".

8. Upon information and belief, plaintiff falsely relied on said alteration for the purpose of inducing the Clerk of this Court to award it a default judgment including an erroneous interest amount based on 9-1/4 per cent of the principal amount of the note.

9. Pursuant to the Uniform Commercial Code §3-407, defendant herein is accordingly discharged.

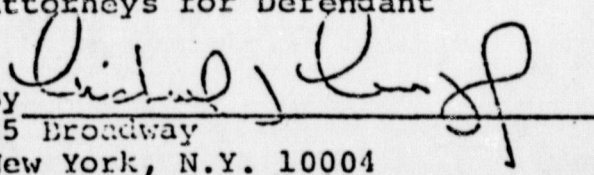
SECOND AFFIRMATIVE DEFENSE

10. This Court lacks jurisdiction over the person of the defendant.

WHEREFORE, defendant requests judgment dismissing the action herein and awarding it its costs and disbursements, and such other and further relief as this Court may deem just and proper.

Yours, etc.,


LORD, DAY & LORD  
Attorneys for Defendant

By   
25 Broadway  
New York, N.Y. 10004

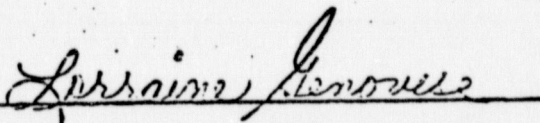


STATE OF NEW YORK     )  
                               :     ss.:  
 COUNTY OF NEW YORK    )

MICHAEL J. MURPHY, being duly sworn, says I am an attorney associated with the firm of Lord, Day & Lord, attorneys for the defendant herein. Defendant is an unincorporated real estate investment trust organized under the laws of the Commonwealth of Massachusetts having its principal place of business in the City of Boston, Massachusetts, and is not in the county where we have our offices. I have read the annexed answer and know it to be true to my knowledge, except as to matters therein stated to be alleged on information and belief and as to these matters I believe them to be true.

  
 Michael J. Murphy

Sworn to before me this  
 4<sup>th</sup> day of February, 1974.



LORRAINE GENNETTE  
 Notary Public, State of New York  
 County of Suffolk  
 Commission Expires March 22, 1975

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

STERLING NATIONAL BANK & TRUST  
COMPANY OF NEW YORK,

Plaintiff,

-against-

FIDELITY MORTGAGE INVESTORS,

Defendant.

74 Civ. 143

J U D G M E N T

M.E.F.

STERLING NATIONAL BANK & TRUST COMPANY OF  
NEW YORK having commenced an action for a money judgment  
against FIDELITY MORTGAGE INVESTORS and

STERLING NATIONAL BANK & TRUST COMPANY OF  
NEW YORK having duly moved for summary judgment and  
The Court having rendered its opinion on  
February 27, 1974,

NOW THEREFORE, it is

ADJUDGED and DECREED that STERLING NATIONAL  
BANK & TRUST COMPANY OF NEW YORK have judgment  
against FIDELITY MORTGAGE INVESTORS in the sum of  
\$1,600,000.00 together with interest in the sum of \$29,193.00  
making a total of \$1,629,193.00.

Judgment entered this  
28th day of February, 1974.

*Raymond F. Burghardt*  
Raymond F. Burghardt, Clerk

*Michael S. Finkel*  
U.S.D.J.

SERVED \_\_\_\_\_  
RECEIVED 3-1-74  
FILED 2-27-74  
CLERK \_\_\_\_\_  
DEPT. MS  
DATE 3-2-74

MICROFILM  
FEB 28 1974



**Defendant.**

74 Civ. 173  
MEMORANDUM  
OPINION

It is clear now, as defendant's counsel has conceded at an oral hearing of the pending motions, that defendant had no defense on the merits of this case when the action was filed in state court as an expedited proceeding allowing a claim for summary judgment as the opening pleading. Defendant removed the case and carefully refrained from serving a responsive pleading, having no response of any kind to make. Plaintiff was driven to move for a default

judgment. While that was probably a meritorious motion, anyone could have predicted that a default judgment for so large an amount would be opened if defendant pressed a desire to be heard. That is what happened. Now, discovering a species of asserted hypertechnicality said to have been born in the motion for a default judgment, defendant makes the stunning claim that the note in suit has become unenforceable.

Defendant purports to find in the motion for a default judgment grounds for a chilling theory of "material alteration" which, defendant claims, should deprive plaintiff of repayment of \$1,600,000 unquestionably due and owing. The theory, if it had merit, would relate, as defendant says, to a species of "fraud." But the supposed "fraud" is nothing of the sort, as defendant should fully recognize. The occasion for the default judgment papers (in which this theory of "fraud" is asserted to originate) was defendant's refusal to file an answer after the removal because it stood on the precious ground that the New York State papers, clearly proper for starting the action,



should not be accepted as a "complaint" here. All the papers of every kind were open to defendant's distinguished law firm at every stage of the proceeding. Everybody knew that none of these papers would in the end escape scrutiny. It is patent that nobody had the slightest intention of tricking the court, the defendant, or defendant's astute counsel.

As anybody could have predicted, the case was not permitted to go off by default. Whether or not defendant was technically right (or, as seems more likely, was mainly seeking delay) in its refusal to file an answer, the court allowed time to answer. Anything that could possibly be said by way of meritorious defense was wide open for the saying. It is clear there was and is no meritorious defense.

The most that might conceivably be open for debate is the rate of post-maturity interest.. On this, however, whether or not defendant's denial has more merit than its other attempts to prevent recovery, plaintiff has declared itself willing to drop its claim for 9 1/8% interest after default and to settle for the undoubtedly proper legal rate of 6%. It follows

that there are no issues of fact or law on the merits to delay the entry of a final judgment ending the case.

The question of long-arm jurisdiction, which defendant chose to bring here after removing the case (achieving some delay by that and then the additional delays already noted) rather than raising it in the courts of the sovereign which is the source of the governing law, is also insufficient to defeat the recovery to which plaintiff is entitled. The making of the loan in New York, the personal contacts in New York (having clearly business origins and significance despite the defendant's preference to call them "social"), the agreement to pay in New York, and defendant's undisputed use of plaintiff as agent to convey the proceeds for credit to defendant at another New York bank are facts which, taken together, support the in personam jurisdiction.

Irving Trust Company v. Smith, 349 F.Supp. 146 (S.D.N.Y. 1972).

Upon the foregoing grounds, plaintiff's motion for summary judgment must be granted and defendant's cross-motion must be denied. Counsel has been directed to prepare a judgment which will be signed and filed along with this memorandum.

Dated: New York, New York  
February 1974

U.S.D.C.



8

STERLING NATIONAL BANK & TRUST  
COMPANY OF NEW YORK,

: NOTICE OF PETITION

**FIDELITY MORTGAGE INVESTORS,**

74 CIV 148  
J. Frankel

PLEASE TAKE NOTICE that the defendant herein has this day filed a petition and bond, copies of which are hereto annexed, in the United States District Court, Southern District of New York, for the removal of the above-entitled action from the Supreme Court of the State of New York, County of New York, to such United States District Court.

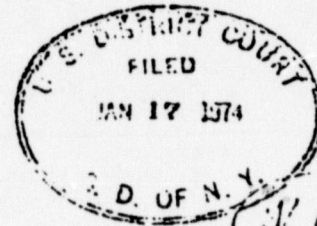
Yours, etc.,

LORD, DAY & LORD

By \_\_\_\_\_  
Of Counsel  
Attorneys for Defendant  
Office & P.O. Address  
25 Broadway  
New York, N.Y. 10004

TO: HARRY GURAHAIN  
Attorney for Plaintiff  
Office & P.O. Address  
540 Madison Avenue  
New York, N.Y. 10022

JAN 9 1974  
JAN 9 1974  
JAN 14 1974



UNITED STATE DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

STERLING NATIONAL BANK & TRUST COMPANY  
OF NEW YORK,

Plaintiff,

-against-

FIDELITY MORTGAGE INVESTORS,

Defendant.

DEFAULT.  
JUDGMENT # 74-081

74 CIV 142

Judge Frankel

This action having been commenced in the Supreme Court of the State of New York, County of New York by the service of a summons and Notice of Motion and Affidavit in lieu of complaint on the defendant FIDELITY MORTGAGE INVESTORS personally on December 10, 1973 and proof of service having been filed in said court on December 17, 1973 and said action having been removed to the United States District Court for the Southern District of New York on January 9, 1974 by a Notice of Petition dated said date of Lord, Day & Lord, Esqs., 25 Broadway, New York, New York and the said defendant FIDELITY MORTGAGE INVESTORS not having appeared, answered or made any motion with respect to the complaint herein and the time for the defendant to appear answer or otherwise move having expired.

NOW, ON MOTION of HARRY GURAHIAN, attorney for plaintiff, STERLING NATIONAL BANK & TRUST COMPANY OF NEW YORK it is,



20 a

ORDERED, ADJUGED AND DECREED that plaintiff **SERLING NATIONAL BANK & TRUST COMPANY OF NEW YORK** have judgment against defendant **FIDELITY MORTGAGE INVESTORS** for the liquidated amount of \$1,600,000.00 together with interest thereon at 9 1/4% per annum from November 7, 1973 to January 17, 1974 amounting to \$31,963.89 with costs and disbursements in the amount of \$20.00 amounting in all to the sum of \$1,631,983.89.

*James A. P. [Signature]*  
Clerk

*James A. P. [Signature]*  
Dated January 17, 1974.

-2-

Defendant of the within named Fidelity Mortgage Investors  
is hereby noted.

Raymond F. Campbell  
Clerk of the United States  
District Court, Southern  
District of New York.

Dated, New York, N.Y.  
January 17<sup>th</sup>, 1974.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x  
STERLING NATIONAL BANK & TRUST  
COMPANY OF NEW YORK,

Plaintiff,

- against -

FIDELITY MORTGAGE INVESTORS,

Defendant.

AFFIDAVIT FOR  
JUDGMENT BY DEFAULT

74 Civ. 148

Judge Frankel

----- x  
STATE OF NEW YORK )  
COUNTY OF NEW YORK ) ss.:

HARRY CURANTAN, being duly sworn, deposes and says, that he is the attorney for the plaintiff Sterling National Bank & Trust Company of New York in the above entitled action, and as such is in charge of and familiar with all the facts in the above entitled action.

This court has jurisdiction of this matter pursuant to 28 U.S.C. Section 1441 and following and 28 U.S.C. Section 1332.

This action was commenced in the Supreme Court of the State of New York, County of New York, by a summons and a motion for summary judgment in lieu of complaint, together with an affidavit setting forth and itemizing the allegations of the complaint, which were served on the defendant Fidelity Mortgage Investors personally on December 12, 1973, and the Sheriff's affidavit of service was duly filed in said court on December 17, 1973. That on January 2, 1974 this action was removed to the United States District Court for the Southern District of New York by a notice of petition dated said date of Lord, Day & Lord, Esqs., 25 Broadway, New York, N.Y.

1.



The defendant has not answered, appeared or made any motion with respect to the complaint herein and its time to answer, appear or otherwise move has expired, and defendant is now in default for failure to answer, appear or move or plead herein. Pursuant to Rule 81 (c) of the Rules of Civil Procedure of this Court applying to the removal of actions, a defendant which has not answered shall answer within twenty days after the receipt of the initial pleading or within twenty days after the service of the Summons or within five days after the filing of the petition for removal whichever period is longest. Accordingly, the time within which the defendant may answer or otherwise move expired on January 14, 1974.

That the amount shown by the statement attached hereto is for a liquidated amount justly due and owing and that no part thereof has been paid and that the disbursements sought to be taxed in this action will necessarily be made or incurred therein. The defendant is a real estate investment trust organized under the laws of the Commonwealth of Massachusetts.

WHEREFORE, it is prayed that the Clerk of this court note and enter the default of the defendant Fidelity Mortgage Investors and enter the decretal judgment against said defendant.

Done to and before me this  
17th day of January, 1974

*[Signature]*  
JAMES J. CONNELLEY

New York  
No. 186272  
Certificate filed in Rockland County  
Term Expires March 10, 1975

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
: STERLING NATIONAL BANK & TRUST COMPANY \*  
: OF NEW YORK, :  
: \*

Plaintiff, : CLERK'S CERTIFICATION

-against- : \* NOTING DEFAULT

FIDELITY MORTGAGE INVESTORS, : \*

Defendant. : \*

74 CIV 148

Judge Frankel

-----x

I, RAYMOND F. BURGHARDT, Clerk of the United States District Court for the Southern District of New York do hereby certify that the docket entries in the above-captioned case indicate that this case was transferred to this Court on January 9, 1974 from the Supreme Court, State of New York County of New York by Notice of Petition dated January 9, 1974 and that the defendant FIDELITY MORTGAGE INVESTORS were served with the summons and complaint on December 10, 1973. I further certify that the docket entries indicate that the defendant has not filed an answer or otherwise moved with respect to the complaint herein and the time to answer or move with respect to the said complaint has expired. The default of the defendant is hereby noted.

*[Signature]*  
Clerk

Subscribed and sworn to before me, this  
January 17, 1974



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

STERLING NATIONAL BANK & TRUST  
COMPANY OF NEW YORK,

Plaintiff,

-against-

FIDELITY MORTGAGE INVESTORS,

Defendant.

STATEMENT FOR DEFAULT  
JUDGMENT

74 CIV 148

Judge Frankel

Principal amount suited for .....\$1,600,000.00

Interest at 9 1/4% per annum  
from November 7, 1973 to January  
17, 1974.....

31,963.89

Photocopy of Note attached  
showing 9 1/4% interest

TOTAL

\$1,631,963.89

Disbursements-

Attorney's docketing fee..... 20.00

TOTAL

\$1,631,983.89



27

\$ 2,000,000.00 ..... Boston, Massachusetts  
On ..... November 7, 1973  
order of ..... \*\*\*\*Sterling National Bank  
..... \*\*\*\*Two Million and No/100\*\*\*\*  
at the ..... New York ..... office of .....



91  
11/ 090-84255  
51

11/7/73

THE NAME FIDELITY MORTGAGE INVESTORS IS THE DESIGNATION OF  
1969, AS AMENDED AND RE-STATE, AND ALL PERSONS DEALING WITH  
THE ENFORCEMENT OF ANY CLAIMS AGAINST FIDELITY MORTGAGE  
PERSONAL LIABILITY FOR OBLIGATIONS ENTERED INTO OR DERIVED

FBI-DO

513.58

750 *paid*  
August 17, 19 73 No. 432  
....., for value received, we promise to pay to the  
& Trust Company  
..... DOLLARS  
Payee  
Fidelity Mortgage Investors  
By *K. B. Fitzpatrick* *ny*  
Authorized Signature  
By *[Signature]*  
Authorized Signature  
IF THE TRUSTEES FOR THE TIME BEING UNDER A DECLARATION OF TRUST DATED MAY 30, 1971 FIDELITY MORTGAGE INVESTORS MUST LOOK SOLELY TO THE TRUST PROPERTY FOR RECOVERY AS NEITHER THE TRUSTEES, OFFICERS, AGENTS OR SHAREHOLDERS ASSUME ANY OF FIDELITY MORTGAGE INVESTORS  
*88* (Hold-out)

26 a

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

STERLING NATIONAL BANK AND TRUST  
COMPANY OF NEW YORK,

Plaintiff,

-against-

FIDELITY MORTGAGE INVESTORS,

Defendant.

**AFFIDAVIT**

74 CIV 148  
(MEF)

STATE OF NEW YORK )  
COUNTY OF NEW YORK ) ss.:

MICHAEL J. MURPHY, being duly sworn, deposes and says:

I am a member of the Bar of this Court and an associate of the firm of Lord, Day & Lord, attorneys for the defendant herein. I make this affidavit in support of the application of the defendant for an order setting aside the ex parte default judgment entered by the Clerk of the Court on January 17, 1974, and requiring the plaintiff to file and serve a formal complaint setting forth its claim.

The Parties:

The plaintiff is a banking association organized under the laws of the United States. Its principal place of business is at 540 Madison Avenue, New York, New York. The defendant is an unincorporated real estate investment trust organized under the laws of the Commonwealth of Massachusetts having its principal place of business at 100 Federal Street, Boston, Massachusetts. It does not have an office in New York, nor does it do business in New York.



The Dispute:

This action, in which a complaint has never been filed nor served, arises out of an alleged liability of the defendant on a promissory note in the amount of Two Million (\$2,000,000) Dollars, dated August 17, 1973. Upon information and belief this note was negotiated via the telephone between New York, on behalf of the plaintiff, and Jacksonville, Florida, on behalf of the defendant. The note was prepared and signed in Jacksonville, Florida and mailed to the plaintiff from Jacksonville. In short, there is a serious and substantial question as to whether any in personam jurisdiction exists over the defendant.

Prior Proceedings:

This action was originally commenced in the Supreme Court of the State of New York, County of New York by the service of a summons and notice of motion for summary judgment in lieu of a complaint pursuant to New York C.P.L.R. §3213 on December 10, 1973. On January 9, 1974 the defendant, through its attorneys, Lord, Day & Lord, removed the case to this Court pursuant to 28 U.S.C. §1441. The plaintiff does not dispute the fact that the case was properly removed to this Court.

Apparently on January 17, 1974 plaintiff successfully made an ex parte application to the Clerk of the Court to enter a default judgment on the grounds that the defendant had not answered the complaint, even though a complaint had never been filed (appended hereto is a copy of the default judgment and papers in support thereof).\*

---

\* This office received notification by mail of the default judgment this afternoon.

Presumably, the Clerk of the Court was under the erroneous impression that a complaint had been filed in this action. For example, the affidavit filed in support of the application for the default judgment contains the following erroneous statement:

"The defendant has not answered, appeared or made any motion with respect to the complaint herein and its time to answer, appear or otherwise move has expired, and defendant is now in default for failure to answer, appear or move or plead herein." p.2  
(Emphasis added)

The Default Judgment Should be Set Aside  
and the Plaintiff Required to File a Complaint.

As noted above, there has never been a complaint filed in this case. Therefore, defendant's time to answer or move has never commenced to run. Rule 81(c) of the Federal Rules of Civil Procedure, relied upon by the plaintiff in its ex parte application to the Clerk of this Court, is not to the contrary. Indeed, it specifically provides that in a removal situation defendant's time to answer does not run until the service of a complaint. It provides in pertinent part:

"In a removed action in which the defendant has not answered, he shall answer or present the other defenses or objections available to him under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest." (Emphasis added)

Rule 81(c) further provides that once a case is removed to the federal court, the Federal Rules of Civil Procedure apply to any further proceedings:

"These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal."



Rule 7(a) of the Federal Rules of Civil Procedure provides that there shall be a complaint in all cases. "There shall be a complaint and an answer .... No other pleadings shall be allowed..."

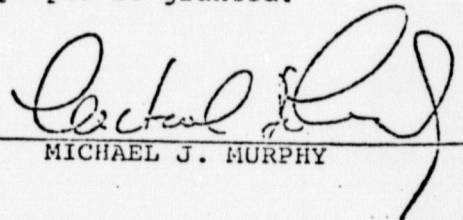
Moreover, Rule 12(a) provides that a defendant "shall serve his answer within 20 days after the service of a summons and complaint upon him ..."

Accordingly, since there has never been a complaint in this action defendant's time to answer has not yet run and the default judgment has been erroneously entered. As such, it should be set aside.

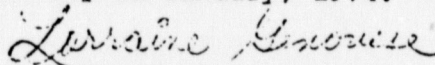
This application is being made by way of order to show cause since unless immediately restrained, the plaintiff could seek to enforce its judgment (in the amount of \$1,631,983.89) and fix liens on the defendant's property in the time period required before a formal motion could be decided by the Court.

No other application for the relief herein requested has been made.

WHEREFORE, it is respectfully requested that the temporary restraining order issue, that the default judgment herein be set aside, that the plaintiff be required to file and serve a formal complaint, and that such other and further relief as this Court may deem just and proper be granted.

  
MICHAEL J. MURPHY

Sworn to before me this  
22nd day of January, 1974.



LORRAIN GROUSE  
Notary Public for the State of New York  
My Comm. Expires 12/31/75  
C. 12/31/75



7  
31

STERLING NATIONAL BANK & TRUST  
COMPANY OF NEW YORK,

31 a

Plaintiff,

vs.

AFFIDAVIT

FIDELITY MORTGAGE INVESTORS,

Petitioner-Defendant.

1-25-74 hand  
filed 1-25-74  
JD

STATE OF FLORIDA  
COUNTY OF DUVAL

KERRY B. FITZPATRICK, being duly sworn, deposes and says:

I am a Vice President of the defendant, Fidelity Mortgage Investors (quoted Fidelity) and I am familiar with the facts concerning the issuance of the \$2,000,000 Note which is the subject of this action. I make this Affidavit in support of the defendant's application to set aside the default judgment herein.

Fidelity is an unincorporated real estate investment trust organized under the laws of the Commonwealth of Massachusetts having its principal place of business at 100 Federal Street, Boston, Massachusetts. It has no offices in New York, nor does it do business in New York.

On August 14, 1973 in Jacksonville, Florida, I received a telephone call from the plaintiff bank requesting the issuance of the Note in question to effect a draw down on a line of credit. Pursuant to that conversation, the Note was prepared and signed in Jacksonville and was mailed to the bank from Jacksonville, Florida, on August 14, 1973. No part of the transaction took place in New York.

Kerry B. Fitzpatrick  
KERRY B. FITZPATRICK

Sworn to and subscribed before me  
this 23rd day of January, 1974

[Signature]  
Notary Public, State of Florida  
My commission expires:



## [Defendant-Appellant's Memorandum]

- c. The entry of the default judgment is void since the Clerk did not have the power to so act, and since the required three days notice was not given to the defendant.
- 

Rule 55 of the FRCP governs the two-step procedure to be followed in a default situation. First the default must be entered, and then the Clerk of the Court, depending upon the circumstances, may enter the default judgment. Rule 55(a) governs the entry of a default, as opposed to a default judgment. It provides that the Clerk in appropriate cases may enter the default where the party against whom the judgment is sought has "failed to plead or otherwise defend".

Subsection (b) governs the procedure for the entry of a judgment upon a default. It provides that the Clerk may enter the judgment where the default is caused by a failure to appear. All other applications, however, including those where the party against whom judgment is sought has appeared, must be made to the Court (as opposed to the Clerk) on 3 days notice.

"By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; \* \* \*. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application."



## [Defendant-Appellant's Memorandum]

In short, if there has been a sufficient "appearance" for the purposes of Rule 55(b), application for judgment must be made to the Court on notice. As noted above, the default judgment in the case at bar was entered by the Clerk, not the Court, without any notice to the defendant. As such it is void, since for the limited purposes of Rule 55(b), there has been a sufficient appearance.

For the purposes of Rule 55(b) the requisite "appearance" need not be a formal appearance. All that is required is that there be a sufficient contact between the parties so that the plaintiff is aware of the fact that the defendant intends to defend the suit, or some presentation or submission to the Court. In this case, the petition of removal and the notice of removal served upon the plaintiff's counsel constitutes that appearance.

Professor Moore explains the meaning of a Rule 55(b) appearance in the following terms:

"A party may be deemed to have filed an appearance ... [for the purposes of Rule 55] ... when there have been contacts between the plaintiff and the defaulting party that indicate the defaulting party intends to defend the suit." 6 J. Moore, ¶55.05[3] at 55-55.



## [Defendant-Appellant's Memorandum]

Professor Wright defines the concept as involving some "presentation or submission to the Court". 10 Wright & Miller §2686 at 270.

In this regard, settlement discussions have been considered enough to constitute an appearance for the purposes of Rule 55. H.F. Livermore Corp. v. Aktiengesellschaft, 432 F.2d 689 (D.C. Cir. 1970). See also, Hutton v. Fisher, 359 F.2d (3rd Cir. 1966) (counsels' agreement to permit a late filing of defendant's answer); Kinnear Corp. v. Crawford Door Sales Co., 49 F.R.D. 3 (D.S.C. 1970) (defendant's letter to plaintiff admitting amount due less set off); Dalminter, Inc. v. Jessie Edwards, Inc., 27 F.R.D. 491 (S.D.Tex. 1961) (letter from defendant's officer to plaintiff indicating that defendant corporation was not in existence at the time of the acts alleged in the complaint).

While a removal does not constitute a general appearance in a sense that it waives jurisdictional defenses,\* it certainly amounts to, in the words of Professor Wright, "some presentation or submission to the Court". Moreover, in face of the removal, the plaintiff can hardly claim that it was unaware that the defendant intended to defend the action.

---

\* See 2A J. Moore, ¶12.12 at 2324-25,

## [Defendant-Appellant's Memorandum]

In summary, for the purposes of Rule 55(b), the defendant made a requisite appearance\* so that any application for the entry of default judgment should have been made to the Court on notice and not to the Clerk. Since the instant application for a default judgment was made ex parte to the Clerk, it is void.



- 
- \* Indeed, the notice of the entry of the judgment received by the defendant's counsel was mailed by the Clerk pursuant to Rule 77(d) of the FRCP which provides in pertinent part:

"Immediately upon the entry of an order or judgment the clerk shall serve a notice of entry by mail ... upon each party who is not in default for failure to appear..."  
(Emphasis added).



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

STERLING NATIONAL BANK & TRUST COMPANY  
OF NEW YORK,

ANSWERING AFFIDAVIT

Plaintiff,

74 CIV. 148

-against-

Judge Frankel

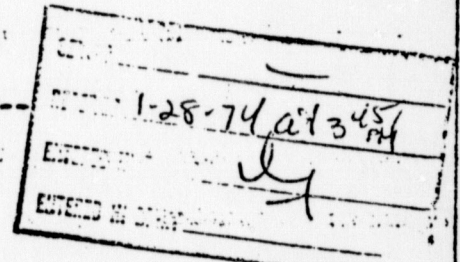
FIDELITY MORTGAGE INVESTORS,

Defendant.

STATE OF NEW YORK)

:ss.:

COUNTY OF NEW YORK)



HARRY GURAHIAN, being duly sworn deposes and says:

He is the attorney for the plaintiff in the above entitled action and as such is fully familiar with the facts in this case. Deponent makes this affidavit in opposition to defendant's application to have vacated a default judgment entered against it.

Defendant seeks to excuse its default on its claim that plaintiff has not served a complaint and that the court clerk must have been under an erroneous impression in entering the judgment.

This action was instituted in the Supreme Court, New York County by the service on December 10, 1973 of a summons, notice of motion and affidavit for summary judgment in lieu of complaint pursuant to New York CPLR Section 3213, returnable January 14, 1974. Defendant was required to answer on or before January 9, 1974. Instead of answering, defendant

ONLY COPY AVAILABLE



removed the case on that date to this Court. Defendant's time to answer the moving papers was thereby extended five days to January 13, 1974 pursuant to Rule 81(c) of the Federal Rules of Civil Procedure. At the moment of removal of the case, all proceedings that had taken place in the State Court were given effect in the Federal Court. The plaintiff was not required to repeat the service of a complaint or to take any further steps in connection with its motion for summary judgment in lieu of the complaint. Defendant's answer to the motion was due on January 14, 1974. On January 15, 1974 when no answer had been received, deponent telephoned Messrs. Lord, Day & Lord, defendant's attorneys and spoke to Michael J. Murphy, Esq., the lawyer in charge of the case, and the affiant in support of defendant's application advising him that no answering affidavits had been received. Mr. Murphy said that since plaintiff had not served a "complaint", defendant was not required to answer, whereupon deponent pointed out to him that all proceedings in the State Court were required to be given effect as of the date of removal to the Federal Court and that he was required to submit answering affidavits pursuant to Rule 81 (c) on or before January 14, 1974. Deponent told counsel that plaintiff would accept defendant's answering affidavits even though it was already in default but notwithstanding that defendant's time to answer had elapsed with respect to the motion in lieu of complaint, defendant's counsel stated that he had no intention of answering unless deponent served a "complaint". Deponent

then advised counsel that under the circumstances plaintiff would proceed to entry of a default judgment against defendant.

Consequently neither counsel nor the judgment clerk of this Court were under any misapprehension as to the facts or the nature of this proceeding. Deponent in his affidavit for judgment by default stated the following which he had already orally explained to Mr. Naughton, the judgment clerk.

"This action was commenced in the Supreme Court of the State of New York, County of New York, by a summons and a motion for summary judgment in lieu of complaint, together with an affidavit setting forth and itemizing the allegations of the complaint, which were served on the defendant Fidelity Mortgage Investors personally on December 10, 1973, and the Sheriff's affidavit of service was duly filed in said court on December 17, 1973. That on January 9, 1974 this action was removed to the United States District Court for the Southern District of New York by a notice of petition dated said date of Lord, Day & Lord, Esqs. 25 Broadway, New York, N.Y.

The defendant has not answered, appeared or made any motion with respect to the complaint herein and its time to answer, appear or otherwise move has expired, and defendant is now in default for failure to answer, appear or move or plead herein. Pursuant to Rule 81 (c) of the Rules of Civil Procedure of this Court applying to the removal of actions, a defendant which has not answered shall answer within twenty days after the service of the summons or within five days after the filing of the petition for removal whichever period is longest. Accordingly, the time within which the defendant may answer or otherwise move expired on January 14, 1974." (Emphasis added)

*no facts  
for me*

*Just this*



It was thus established beyond any doubt that plaintiff instituted this action by a summons and motion for summary judgment in lieu of a complaint and that it sought to enter judgment upon defendant's failure to answer the same.

The law is clear that no complaint was required to be filed after the removal of this case to the District Court.

(See accompanying memorandum of law) Plaintiff's motion for summary judgment and affidavit took the place of the complaint. The affidavit which separately stated all of the allegations of a complaint clearly informed the defendant of the claim against it and it could have submitted answering affidavits if it had a defense to the action. Since the defendant failed to answer, the default judgment was properly entered.

To sum up, defendant has not shown good cause for its default in answering and its failure to answer was deliberate.

Equally fatal to defendant's application is the total lack of any affidavit of merits. No attempt is made to claim any substantive defense to the action.

A feeble claim of lack of "personal" jurisdiction is asserted, but it is not well taken on the facts or the law. The action was instituted under the "long arm" statute of N.Y. CPLR Section 302 which gives personal jurisdiction over any nondomiciliary who in person or through an agent transacts any business within the state from which the cause of action arises.



*Copy of  
motion  
for summary  
judgment*

The accompanying memorandum sets forth the law to the effect that the Court has in personam jurisdiction over this defendant. Furthermore, defendant has waived any jurisdictional defense since in paragraph 3 of its petition for removal of the case it has acknowledged the jurisdiction of this Court without reserving any claim of lack of jurisdiction.

Since the defendant has no defense, the only interpretation that can be given to this application is that it seeks to delay the entry of a judgment and collection thereof. If the judgment were to be vacated, the plaintiff would be seriously prejudiced. Defendant's July 31, 1973 quarterly report shows short term borrowings of about One Hundred Seventy Million Dollars (\$170,000,000.00). Upon information and belief defendant is unable to pay said indebtedness and is attempting to renegotiate it. Plaintiff's diligence in proceeding to enforce its rights will be thwarted to its detriment if the judgment is vacated since there is no prospect in the end that defendant will prevail. To vacate the judgment will serve only to assist defendant in its dilatory tactics.

Since the defendant's default was deliberate and it does not even assert any defense to the action on the merits, and further since there can be no question as to this Court's jurisdiction, it is respectfully submitted that defendant's motion to vacate the judgment be denied. There being no good cause shown for granting the motion it is respectfully submitted there is no discretion in the Court to do so.

However, if notwithstanding the foregoing, the court sees fit to allow the defendant to answer, it is respectfully requested that it be conditioned on the posting of a bond for the full amount of the judgment, and requiring that the answer of the defendant must be addressed to the motion for summary judgment since plaintiff is not required to serve additional pleadings.

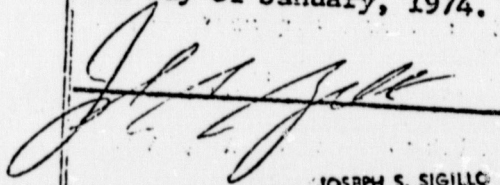
Finally, it is respectfully submitted that the order to be entered herein reserve to plaintiff the right to proceed under the bond filed herein upon the signing of the order to show cause should it develop that plaintiff has suffered prejudice through the stay in the order to show cause.

WHEREFORE, deponent respectfully requests that defendant's motion to vacate the default judgment entered against it be denied and in the event that the motion is granted that it be conditioned upon the defendant posting a bond for the full amount of the judgment heretofore entered against it and for such other and further relief as to this Court may seem just and proper.

15/  
Harry Gurahian

Sworn to before me this

24th day of January, 1974.



JOSEPH S. SIGILLO  
Notary Public, State of New York  
No. 3662925  
Certificate filed in Rockland County  
Term Expires March 30, 1975



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

STERLING NATIONAL BANK & TRUST  
COMPANY OF NEW YORK,

Plaintiff,

ANSWERING AFFIDAVIT

-against-

74 Civ. 143

Judge Frankel

FIDELITY MORTGAGE INVESTORS,

Defendant.

STATE OF NEW YORK )

: ss.:

COUNTY OF NEW YORK )

deposes and says:

JOSEPH A. SCIARILLO, being duly sworn,

That he is a Vice President of Sterling National Bank & Trust Company of New York, the plaintiff herein, and is fully familiar with the facts in the above-entitled action. Deponent makes this affidavit in opposition to defendant's application to have vacated a default judgment entered against it, addressing himself particularly to the defendant's claim of lack of personal jurisdiction.

Defendant commenced its business relationship with plaintiff by the opening of a checking account at plaintiff's bank, 1410 Broadway, New York, New York on April 6, 1972. A line of credit was granted to the defendant in the amount of 1 million dollars and defendant commenced borrowing money thereunder. On March 1, 1973 plaintiff



Financial Vice President of defendant was informed thereof by deponent at the annual stockholder's meeting of defendant, Fidelity Mortgage Investors held on March 7, 1973 at Morgan Guaranty Trust Company, 15 Broad Street, New York. In conjunction with the increase of the line of credit, defendant agreed to make an additional \$100,000.00 deposit with plaintiff in compensating balances which it did on March 14, 1973.

On August 17, 1973 upon receipt of a note for 2 million dollars through the mail, plaintiff credited defendant's account maintained at plaintiff's 1410 Broadway branch in the City of New York the sum of \$1,957,861.11, the net proceeds of the loan. The delivery of the note was not only completed in New York but was simply a means of evidencing defendant's indebtedness under its line of credit established in New York by plaintiff a New York bank. Shortly after the loan was made, plaintiff transferred \$1,757,861.11 to defendant's account at Morgan Guaranty Trust Company at defendant's request. A photocopy of the note is annexed hereto as Exhibit "A" and a photocopy of the bank statement showing the deposit to defendant's account as Exhibit "B". Except that the note had been mailed to plaintiff, the entire transaction was effected and consummated in New York. Of course, the performance of the contract, that is the making of the loan and the repayment thereof, was in New York.

Deponent believes that defendant has no defense to the action, it having failed to repay the money it borrowed. Any delay in the collection of this indebtedness will cause serious harm to the plaintiff. Defendant has short term indebtedness of about \$170,000,000. of which over \$100,000,000 is due to

*Handwritten:*  
 10/10/73  
 W. J. S.

*Handwritten:*  
 not a  
 mortgage  
 loan  
 cause  
 action  
 + transfer

banks as set forth in its July 31, 1973 quarterly financial statement. Defendant has failed to make payment of the indebtedness to these banks and has been attempting to renegotiate said loans. It appears therefor that defendant's real purpose in seeking to vacate the judgment is simply to delay the collection of a just debt against it.

WHEREFORE, deponent respectfully requests that defendant's motion to vacate the default judgment entered against it be denied.

15  
JOSEPH A. SCIARILLO

Sworn to before me this  
25th day of January, 1974.

751  
Notary Public

HARRY CURRIE  
Notary Public, State of New York  
No. 50-67032  
Qualified in Nassau County  
Commission Expires March 30, 1974

EXHIBIT "A"

1,600,000  
\$2,000,000.00----- Boston, MA  
On November 7, 1973  
order of \* \*\*\*\*Sterling Natl  
\* \*\*\*\*Two Million and No  
at the New York office



9/14 090-84  
11/2/73

THE NAME FIDELITY MORTGAGE INVESTORS IS THE  
ONLY AS AMENDED AND RESTATED, AND ALL PE  
THE ENFORCEMENT OF ANY CLAIMS AGAINST FID  
PERSONAL LIABILITY FOR OBLIGATIONS ENTERED

FMI-8D

5



27750-PAW  
Massachusetts August 17, 1973 No. 432

for value received, we promise to pay to the  
Fidelity Bank & Trust Company

100\*\*\*\* DOLLARS

of Payee

Fidelity Mortgage Investors

255  
54  
By

K. B. Fitzpatrick

Authorized Signature

By

R. J. Way

Authorized Signature

THE DESIGNATION OF THE TRUSTEES FOR THE TIME BEING UNDER A DECLARATION OF TRUST DATED MAY 20,  
1973, WHEREBY THE TRUSTEES MUST LOOK SOLELY TO THE TRUST PROPERTY FOR  
THE PAYMENT OF THE MORTGAGE INVESTORS AS NEITHER THE TRUSTEES, OFFICERS, AGENTS OR SHAREHOLDERS ASSUME ANY  
LIABILITY ON BEHALF OF FIDELITY MORTGAGE INVESTORS

13.5888

(Hold-out)

45 a

**.46 a**

STERLING NATIONAL BANK  
100 WALL STREET, NEW YORK, N. Y.

FIDELITY PORTAGE  
INVESTORS  
66: RIVERSIDE AVE.  
EC BOX 4014  
JACKSONVILLE FLA 32203

22 Oct 25 5

AUG 31 72  
 50700000

CHECKS LISTED IN ORDER PAID LEFT TO RIGHT	DEPOSITS	DATE	BALANCE
1,757,861.11M	1,957,861.11C	8-17	250,000.00

EN DISTANCE  
 EN CHARGE WITH  
 AT RETURN TO  
 BY MIXING  
 BY MAINTENANCE SCHEDULE

	DEBITS	CREDITS	FINAL BALANCE
1	1,752,861.11	1,957,861.11	205,000.00

SE BOMBING CHANGE  
JL 110707Z  
LB 110707Z  
SE BOMBING CHANGE

**PLEASE EXAMINE STATEMENT OF ACCOUNT AND VOUCHERS AND REPORT ANY ERROR IMMEDIATELY**

This report is given to the member of the New York City Council at the time the basic statement is received. It is the responsibility of the member to report any error to the Council. It is the responsibility of the Council to report any error to the Council. It is the responsibility of the Council to report any error to the Council.

FOR YOUR CONVENIENCE A RECONCILIATION FORM IS PRINTED ON REVERSE SIDE

[Plaintiff-Appellees's Memorandum]

\* \* \*  
account maintained at a New York bank each constitute an act in the transaction of business in New York. Anyone of these acts is sufficient to confer in personam jurisdiction upon the defendant.

POINT III

DEFENDANT HAS NOT SHOWN GOOD CAUSE FOR THE SETTING ASIDE OF THE DEFAULT JUDGMENT ON EITHER SUBSTANTIVE OR PROCEDURAL GROUNDS.

Defendant has failed to show good cause for setting aside entry of the judgment. Not only did the defendant deliberately default, but it has failed to allege any meritorious defense to the action.

The default judgment was properly entered. Defendant deliberately defaulted in spite of the offer to defendant's attorney to let him appear and defend the action. The affidavit of plaintiff's attorney for judgment by default clearly and fairly stated all the circumstances upon which the default judgment was requested.

Defendant's contention that it appeared but did not submit to the jurisdiction is erroneous. If defendant appeared, it submitted to the jurisdiction since it did not reserve any rights with respect thereto. In that event the alleged jurisdictional defense is without merit.



Nor does Rule 55 (b) help defendant. This is purely a procedural protection. The purpose of the rule is obviously to enable defendant to show either that it is not in default, or to make application to open any default or with respect to the entry of judgment. It now has had this opportunity with considerably more than three days notice and has yet to urge any sound basis for relief from its default. Whether notice was given before the entry of judgment or now does not alter that fact.

One can state with certainty on the record and defendant's brief that defendant has conclusively established its objective in this application: to forestall and delay by whatever means available the inevitable entry of a judgment on a promissory note to which it neither has nor claims any defense on the merits.

#### CONCLUSION

The defendant having failed to show good cause for the setting aside of the judgment by default entered against it, the judgment should stand. In the event it is deemed that the judgment should be vacated, no further complaint is required to be filed and defendant's answer should be addressed to the motion for summary judgment and the

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

STERLING NATIONAL BANK & TRUST  
COMPANY OF NEW YORK,

Plaintiff,

-against-

FIDELITY MORTGAGE INVESTORS,

Defendant.

NOTICE OF MOTION

74 Civ. 143  
M.E.F.

S I R S:

PLEASE TAKE NOTICE that upon the annexed statement pursuant to Rule 9 (g), the annexed affidavit of JOHN J. FOWLER, JR. verified the 5th day of February, 1974 and memorandum of law in support of the motion for summary judgment and upon the pleadings, plaintiff by its attorney HARRY GURAHIAN will move this Court before Hon. Marvin E. Frankel at 10 o'clock in the forenoon on the 15th day of February, 1974 in room 2002 of the United States Courthouse, Foley Square, New York, New York for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting summary judgment in favor of plaintiff and against defendant in the sum of \$1,614,183.33 with interest on the sum of \$1,000,000.00 at the rate of 9 1/4% per annum computed from December 5, 1973 plus the costs and disbursements

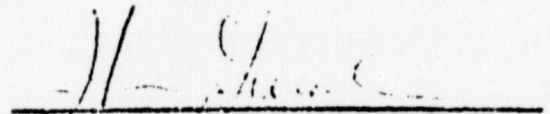


50 a

of this action and for such other and further relief as to this Court may seem just and proper.

Dated: New York, New York  
February 4, 1974

Yours, etc.



HARRY GURAHAN  
Attorney for Plaintiff  
Office & P.O. Address  
540 Madison Avenue  
New York, New York 10002  
752-6292

TO: LORD DAM & LORD, ESQS.  
Attorneys for Defendant  
Office & P.O. Address  
25 Broadway  
New York, New York 10004  
DI 4-3480

ONLY COPY AVAILABLE



Defendant.

74 Civ. 148  
M.E.F.

4. On December 4, 1973 plaintiff set off \$400,000.00 from defendant's account maintained at plaintiff bank and

credited said amount to the indebtedness due to plaintiff.

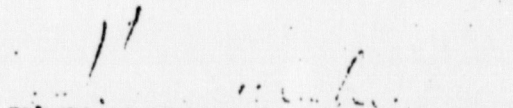
5. That no payment was made by the defendant against said indebtedness except for the aforesaid sum of \$400,000.00.

6. The rate of interest agreed to be paid under said note was 9 1/4% per annum.

7. There is now due on said note the sum of \$1,600,000.00 plus accrued interest from November 7, 1973 to December 5, 1973 (the date this action was commenced) in the sum of \$14,123.33 plus further interest computed at the rate of 9 1/4% per annum on the sum of \$1,600,000.00 from December 5, 1973.

8. Defendant transacted business within the State of New York in that the loan was made in New York, the note evidencing the indebtedness having been delivered in New York on the basis of a line of credit established in New York in a New York bank, the proceeds of the loan having been credited to defendant's account in New York at plaintiff bank and the note, by its terms, being payable in New York and this cause of action arises therefrom giving the court in personam jurisdiction over the defendant.

Dated: New York, New York  
February 5<sup>th</sup>, 1974

  
\_\_\_\_\_  
HARRY GORMAN  
Attorney for Plaintiff  
Office & P.O. Address  
510 Madison Avenue  
New York, New York 10022



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x  
:  
STERLING NATIONAL BANK & TRUST \*  
COMPANY OF NEW YORK, :  
:  
Plaintiff, \*  
:  
-against- :  
:  
FIDELITY MORTGAGE INVESTORS. :  
:  
Defendant. :  
----- x

A F F I D A V I T

74 Civ. 148  
M.E.F.

STATE OF NEW YORK )  
: ss.:  
COUNTY OF NEW YORK)

JOHN J. FOWLER, JR. being duly sworn deposes and says:

That he is Executive Vice President and Senior Loan-  
ing Officer of STERLING NATIONAL BANK & TRUST COMPANY OF NEW YORK,  
the plaintiff herein and as such is fully familiar with all the  
facts and circumstances hereinafter set forth. Plaintiff is a  
national banking association organized under the laws of the United  
States of America. Defendant, FIDELITY MORTGAGE INVESTORS, is a  
real estate investment trust organized under the laws of the  
Commonwealth of Massachusetts.

This is an action to recover the past due indebted-  
ness of \$1,600,000.00 plus interest under a promissory note  
executed by the defendant in the sum of two million dollars. A  
copy of said note is annexed hereto, made a part hereof and  
marked Exhibit "A". This action was instituted in Supreme Court,



New York County by the service of a summons and motion for summary judgment in lieu of complaint upon the defendant in Florida by the Sheriff of Duval County Florida on December 10, 1973. Proof of service was filed in Supreme Court on December 17, 1973. The case was subsequently transferred to this Court by reason of diversity of citizenship. This court has entered an order which deems the affidavit on the aforesaid motion for summary judgment to be the complaint in this action.

Defendant commenced its business relationship with plaintiff by opening a checking account at plaintiff bank at its banking office at 1410 Broadway, New York, N.Y. on April 6, 1972. A line of credit was granted to defendant in the amount of one million dollars and it commenced borrowing thereunder. On March 1, 1973 plaintiff increased the line of credit to two million dollars and defendant continued its borrowing.

On or about August 17, 1973 defendant made, executed and delivered its promissory note in writing dated said date (Exhibit "A") wherein it promised to pay to the order of plaintiff the sum of two million dollars on November 7, 1973. The note, mailed by defendant from its place of business in Jacksonville, Florida was received by plaintiff at its place of business in New York and is payable in New York at plaintiff's banking office. When plaintiff received the note, it discounted the same and credited defendant's account maintained at the bank's 1410 Broadway branch in the City of New York in the sum of \$1,957,861.11, the net proceeds of the loan.

The cause of action sued upon herein arises from the transaction of business by the defendant within the City and State of New York within the meaning of N.Y. CRR §202 (a) 1,

in that defendant delivered the note to plaintiff at plaintiff's place of business in New York; the loan was made in New York; the funds credited to defendant's account in New York; and the note was payable in New York.

Plaintiff is the owner and holder of said note, the original of which is in plaintiff's possession. On the due date defendant failed to make payment although duly demanded by plaintiff.

On December 4, 1973, after defendant's default in payment, there was set off from defendant's demand deposit account maintained with plaintiff the sum of \$400,000.00 which was credited to defendant's indebtedness under the note. Consequently, there is now due and owing the sum of \$1,600,000.00 plus interest. The rate of interest charged defendant was 9 1/4% per annum discounted, a pencil notation of which is marked on the note. There remains interest due and owing computed from November 7, 1973 to December 5, 1973 (when the action was commenced) in the sum of \$14,103.33 and interest continues to accrue at the rate of 9 1/4% per annum on the sum of \$1,600,000.00 from December 5, 1973. No part of said principal or interest has been paid although duly demanded and there is now due and owing \$1,614,103.33 together with interest on the sum of \$1,600,000.00 computed from December 5, 1973 at the rate of 9 1/4% per annum.

Defendant's answer is sham in that it fails to raise any defence and there is no genuine issue to be tried. There is attached hereto as Exhibit "D" a photostatic copy of defendant's bank statement for the period ending August 31, 1973 showing a deposit to its account on August 17, 1973 of the sum



of \$1,257,361.11, the proceeds of the loan. The defendant in paragraph 3 of its answer admits the making and execution of the note, and thus the borrowing of the money. It admits in paragraph 5 of its answer that no part of the note has been paid except the \$400,000.00. Nevertheless, defendant denies that the unpaid balance of \$1,600,000.00 is due on the basis of an alleged defense that the note has been altered by adding the figure "9 1/4" which according to the defendant materially altered the note.

The insertion of "9 1/4" is not an alteration and at any rate is not material. The defendant agreed to the 9 1/4% rate and the notation on the note was made merely for use in the bank's internal operations. An examination of the note will clearly show that the 9 1/4 notation does not change or alter any of the terms of the note. It is a discounted note having a face value of two million dollars with the interest discounted in advance in the amount of \$42,133.89 the equivalent of 9 1/4% interest per annum for 82 days from August 17, 1973 to November 7, 1973.

The defendant recognized this and confirmed it in writing. On August 14, 1973, defendant wrote a letter to the bank (a copy is annexed as Exhibit "C") wherein defendant confirmed the rate of interest to be 9 1/4%.

Furthermore, the bank's records confirm that the agreed rate of interest was 9 1/4% per annum. A copy of the credit department's ticket sent to defendant when the loan was made, annexed hereto as Exhibit "D" shows the 9 1/4% rate of interest and the amount of the discount as \$42,133.89. Incidentally, a mathematical computation will show that the latter sum is equivalent to 9 1/4% per annum interest on two million dollars.



for the 82 day period of the note. The liability record for the defendant's account, a copy of which is annexed as Exhibit "B" likewise shows the 9 1/4% rate of interest, as well as the unpaid balance of \$1,600,000.00.

It can be readily seen, therefore, that the defendant's alleged defense of alteration of the note is without merit. Deponent believes that defendant is merely seeking to delay the entry of a judgment against it for a debt which is justly due and owing. It can only be concluded that the so-called defense of material alteration is sham. Not only is it without any basis in fact but the defendant knows that the adding of the pencil notation of 9 1/4% to the note was not a material alteration of the note. Defendant's knowledge of and acquiescence thereof is evidenced by the attached exhibits.

Defendant's claim that it did not transact any business within the State of New York is likewise without merit. Not only was the loan made and to be repaid in New York and the proceeds credited to defendant's account in New York, but at defendant's request the sum of \$1,757,861.11 was transferred by bank wire to defendant's account at Morgan Guaranty Trust Company in New York. Defendant's instructions to that effect are set forth in Exhibit "C".

It is evident from a recitation of the foregoing facts that defendant engaged in business within this state from which the cause of action arises, conferring in this Court personal jurisdiction over the defendant. A memorandum of law as to such jurisdiction is being submitted herewith.

This defendant has no defense to this action. The answer fails to raise a triable issue of fact and there is no genuine issue to be tried. It is apparent that the defendant's actions are purely dilatory and the answer has been interposed solely for purposes of delay.

Defendant is presently attempting to renegotiate and extend over one hundred fifty million dollars of past due indebtedness to various banks and plaintiff has declined to join in any extension, but seeks to enforce its right to the prompt collection of this debt which is justly and truly owing. Deponent believes that any delay in the collection of this debt will cause drastic and irremediable damage to plaintiff.

WHEREFORE, deponent respectfully prays that this Court grant an order striking the answer of the defendant on the ground that it fails to state a genuine issue and for an order granting the plaintiff summary judgment against the defendant for the sum of \$1,614,183.33 together with interest on the sum of \$1,000,000.00 computed from December 5, 1973 at the rate of 9 1/4% per annum together with the costs and disbursements of this action and for such other and further relief as to this Court may seem just and proper.

181  
JAMES J. HENRY, JR.

Sworn to before me this  
5th day of February, 1974

181  
Notary Public







EXHIBIT "A"

1,600,000 277  
\$2,000,000-00 Boston, Massachusetts  
On November 7, 1973  
order of \* \*\*\*Sterling National Bank &  
\* \*\*\*Two Million and No/100\*\*\*  
at the New York office of



9/14 090-84255  
54  
11/7/73

THE NAME FIDELITY MORTGAGE INVESTORS IS THE DESIGNATION OF THE  
TRUST, AS AMENDED AND RESTATED, AND ALL PERSONS DEALING WITH THE  
TRUST, THE ENFORCEMENT OF ANY CLAIMS AGAINST FIDELITY MORTGAGE INVESTORS  
PERSONAL LIABILITY FOR OBLIGATIONS ENTERED INTO ON BEHALF OF THE

FMI-00

513.888

50-12

August 17, 19 73 No. 432

for value received, we promise to pay to the  
Trust Company

..... DOLLARS  
Payee

# Fidelity Mortgage Investors

By *K. B. Fitzpatrick* *ny*  
Authorized Signature

By *R. J. May*  
Authorized Signature

TRUSTEES FOR THE TIME BEING UNDER A DECLARATION OF TRUST DATED MAY 22  
FIDELITY MORTGAGE INVESTORS MUST LOOK SOLELY TO THE TRUST PROPERTY FOR  
AS NEITHER THE TRUSTEES, OFFICERS, AGENTS OR SHAREHOLDERS ASSUME ANY  
FIDELITY MORTGAGE INVESTORS

(Hold-out)

592



**STAPLING MATERIAL BANK**

CG C-4-25 5

AJ3 31 72  
BALANCE & FORWARD  
50000.00

CHECKS LISTED IN ORDER PAID LEFT TO RIGHT	DEPOSITS	DATE	BALANCE
1,757,851.110M	1,957,861.112M	5-17	252,009.03

DEBITS		CREDITS		FINAL BALANCE	
1	1,957,354.11	1,957,354.11		250,000.00	

PLEASE EXAMINE STATEMENT OF ACCOUNT AND VOUCHERS AND REPORT ANY ERRORS IMMEDIATELY

46 66000000 : 00000000  
 47 00000000 : 00000000  
 48 00000000 : 00000000  
 49 00000000 : 00000000



61 a

# Fidelity Mortgage Investors

*Invoice 154*

August 14, 1973

Sterling National Bank & Trust Co.  
540 Madison Avenue  
New York, NY 10022

Attention: Mr. John J. Fowler

Gentlemen:

We enclose our Note as indicated below.

Please bankwire \$1,757,861.11 of the proceeds of the note to Morgan Guaranty Trust Company, New York, New York, for credit to the account of Fidelity Mortgage Investors, Account No. 020-82-480.

<u>Face Amount</u>	<u>Date of Note</u>	<u>Due Date</u>	<u>Note No.</u>	<u>Rate</u>	<u>Days</u>	<u>Discount</u>	<u>Net Proceeds</u>
\$2,000,000	8/17/73	11/7/73	432	9 $\frac{1}{4}$	82	42,138.89	1,957,861.

FIDELITY MORTGAGE INVESTORS

*K. B. Fitzgerald*  
Authorized Signature

*R. J. Wayne*  
Authorized Signature

Form FMI 6

THE NAME FIDELITY MORTGAGE INVESTORS IS THE DESIGNATION OF THE TRUSTEES FOR THE TIME BEING UNDER A DECLARATION OF TRUST DATED MAY 22, 1969, AS AMENDED AND RESTATED, AND ALL PERSONS DEALING WITH FIDELITY MORTGAGE INVESTORS MUST LOOK SOLELY TO THE TRUST PROPERTY FOR THE ENFORCEMENT OF ANY CLAIMS AGAINST FIDELITY MORTGAGE INVESTORS AS NEITHER THE TRUSTEES, OFFICERS, AGENTS OR SHAREHOLDERS ASSUME ANY PERSONAL LIABILITY FOR OBLIGATIONS ENTERED INTO ON BEHALF OF FIDELITY MORTGAGE INVESTORS

16528-12503-7-71

# STERLING NATIONAL & TRUST COMPANY

340 MADISON AVENUE, NEW YORK 17

NUMBER	MAKER	ENDORSER	CODE	DATE OF NOTE	TIME	DU DA
138	GEN		513.9600	6/17	11/7	11/

CREDIT  
ACC. OF

→

095 84285  
FIDELITY MORTGAGE INVESTORS  
C/O FIDELITY MTGE. ADVISORS  
BOX 4216  
JACKSONVILLE FLA. 32203

WHERE PAYABLE

JJF

D-2

EXH D



**ONAL BANK  
OF NEW YORK**

YORK, N.Y. 10022

**CREDIT DEPT.**

DATE		DAYS	AMOUNT OF NOTE	DISCOUNT	EXCHANGE	PROCEEDS
7/73	91	82	2,000,000.00	2,132.39		1,937,867.61

HERE

RC1173

	RATE	DATE	OWN	✓	RECEIVABLES	✓	COLLATERAL
/7	9½	11/7/73	2,000,000.00				
			2,000,000.00				
17	9½	11/7/73	1,600,000.00				
EXH E							

OWN	RECEIVABLES	COLLATERAL	DATE
2000.00 0.00 S	0.00	0.00	JUG 11 B 2000.00 C.B.
0.00 S	0.00 T	0.00 T	SEP 14 B
1600.00 0.00 S	0.00 T	0.00 T	JAN 24 1600.00 0.00

632



56 UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
: STERLING NATIONAL BANK AND TRUST  
: COMPANY OF NEW YORK, :

Plaintiff, :

-against- :

FIDELITY MORTGAGE INVESTORS, :

Defendant. :

AFFIDAVIT

: 74 CIV 148  
: (MEF)

-----x  
STATE OF NEW YORK )  
: ss.:  
COUNTY OF NEW YORK )

MICHAEL J. MURPHY, being duly sworn, deposes and says:

I am a member of the bar of this Court and an associate of the firm of Lord, Day & Lord, attorneys for the defendant herein.

I make this affidavit in opposition to the plaintiff's motion for summary judgment. The purpose of this affidavit is to summarize the facts, as we now know them to be, concerning the material alteration of the note which is the subject matter of this action.\*

Annexed hereto as Exhibit A is a true copy of the note as it appeared on August 14, 1973 when it left the possession of the defendant (see affidavit of Kerry B. Fitzpatrick, sworn to on February 8, 1974). As may be seen, the note is a non-interest bearing instrument with a maturity date of November 7, 1973.

---

\* A discovery request concerning this issue was served upon the plaintiff on February 4, 1974, the day issue was joined.

Nowhere on the note does there appear any reference to interest, either pre or post-maturity.

The omission of any reference on the note to post-maturity interest is particularly significant. Pursuant to §3-122(4) of the Uniform Commercial Code, unless the note provides otherwise, the holder of the note is entitled, in the event the note is not paid timely, to interest for the post-maturity period at the rate which it would be entitled as if it had a judgment on the instrument. §3-122(4) provides in pertinent part:

"Unless an instrument provides otherwise, interest runs at the rate provided by law for a judgment

(a) in the case of a maker, acceptor or other primary obligor of a demand instrument, from the date of demand;

(b) in all other cases from the date of accrual of the cause of action."

Pursuant to subsection 1 of the same section of the UCC, the cause of action in the instant case accrued on the date after the maturity date, or November 8, 1973.

"A cause of action against a maker or an acceptor accrues

(a) in the case of a time instrument on the day after maturity;"

Accordingly, in the instant case, assuming arguendo, the validity of the note, the plaintiff bank would be entitled to post-maturity interest of 6% (CPLR §§5003-5004).

With this background in mind, the attention of the Court is respectfully drawn to the document appended hereto as Exhibit B - the plaintiff's Statement for Default Judgment submitted to the Clerk of this Court on January 17, 1974 in support of the plaintiff's ex parte application for a default



judgment. This document, after itemizing the net principal amount of the debt (\$1,600,000)\*, then states what the plaintiff represented (to the Clerk on an ex parte basis) it was entitled to in the way of post-maturity interest, i.e., 9-1/4% from the date of maturity to the day of the judgment. In support of this interest claim the plaintiff specifically directed the Clerk's attention to an attached purported copy of the note which, according to the plaintiff, presumably was evidence of the fact that the parties had agreed that 9-1/4% interest would be paid for any post-maturity period.

"Interest at 9-1/4% per annum  
from November 7, 1973 to  
January 17, 1974.....\$31,963.89  
Photo copy of Note attached  
showing 9-1/4% interest" (emphasis added)

Annexed hereto as Exhibit C is a true copy of the copy of the note presented to the Clerk in support of the plaintiff's computation of damages. Upon examination of this Exhibit, it becomes immediately apparent that the plaintiff when it represented that it was entitled to post-maturity interest at 9-1/4% relied on what appears to be a handwritten addition to the note of "9-1/4."

As the affidavit of Kerry B. Fitzpatrick, sworn to on February 8, 1974 submitted herewith, makes clear there never was any agreement to pay post-maturity interest at any rate, nor did the note which left the possession of the defendant in August, 1973 provide for the payment of any interest. Surely

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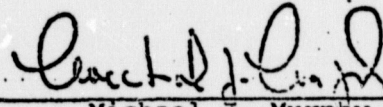
\* There is yet another version of the note which shows the \$2,000,000 principal amount crossed through, and a handwritten amount of \$1,600,000 above it. See Exhibit A to the affidavit of Joseph A. Sciarillo, sworn to on January 25, 1974 filed in opposition to setting aside the default judgment.



the plaintiff was aware of that fact when it made its default application.

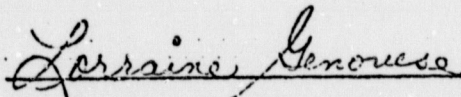
For the reasons set forth in Point II of the memorandum of law filed herewith, this alteration is material and the use to which it was put by the plaintiff at the very least raises the inference that it was fraudulent. Pursuant to the applicable provisions of the Uniform Commercial Code such an alteration discharges the defendant herein.

Accordingly, it is respectfully submitted that in the event this action is not dismissed for lack of in personam jurisdiction, the plaintiff's motion for summary judgment should be denied, and the defendant should be afforded the opportunity to fully develop the circumstances surrounding the making of the alteration and what appears to be the fraudulent use of it by the plaintiff.



Michael J. Murphy

Sworn to before me this  
11th day of February, 1974



LORRAINE GENOVESE  
Notary Public for the State of New York  
Commission Expires March 15, 1975

ONLY COPY AVAILABLE

\$2,000,000.00 ..... Boston, Massachusetts .....  
On ..... November 7, 1973 .....  
order of ..... Sterling National Bank & .....  
..... Two Million and No/100 .....  
at the ..... New York ..... office of ..... P.



THE NAME OF THE MORTGAGE INVESTOR IS THE DESIGNATION OF THE  
1934 AS A LIMITED LIABILITY COMPANY, AND ALL PERSONS DEALING WITH THE  
THE KNOWLEDGE OF ANY CLAIMS AGAINST FILED BY MORTGAGE INVESTOR  
PERSONAL LIABILITY FOR OBLIGATIONS ENTERED INTO ON BEHALF OF THE

EMISSD

August 17, 1973 No. 432

for value received, we promise to pay to the  
Trust Company

DOLLARS  
payee

Fidelity Mortgage Investors

By *W. B. [Signature]*  
Authorized Signatory

By *[Signature]*  
Authorized Signatory

TRUSTEES FOR THE TIME BEING UNDER A DECLARATION OF TRUST DATED MAY 30,  
FIDELITY MORTGAGE INVESTORS MUST LOOK SOLELY TO THE TRUST PROPERTY FOR  
REPAYMENT AS NEITHER THE TRUSTEES, OFFICERS, AGENTS OR SHAREHOLDERS ASSUME ANY  
LIABILITY MORTGAGE INVESTORS

682



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

STANDARD NATIONAL BANK & TRUST  
CORPORATION OF NEW YORK,

Plaintiff,

-against-

FIDELITY MONETARY INSTITUTIONS,

Defendant.

STAGGERING FOR DEFENDANT  
J. H. HARRIS

7% CIV 143

Judge Frankel

Principal amount added for ..... \$1,600,000.00

Interest at 9 1/4% per annum  
from November 7, 1973 to January  
17, 1974.....

31,963.89

Photocopy of note attached  
showing 9 1/4% interest

TOTAL

\$1,631,963.89

Disbursements:

Attorney's docketing fee.....

20.00

\$1,631,983.89

TOTAL

2,000,000.00 Boston, Massachusetts August 17, 1972 No. 432  
On November 7, 1973 for value received, we promise to pay, at the  
order of Sterling National Bank & Trust Company  
Five Million and No/1000000  
of the New York office of Payee

Fidelity Mortgage Investment

By

or

*[Signature]*  
F. B. [Signature]  
*[Signature]*

THIS FIDELITY MORTGAGE INVESTMENT IS THE DESIGNATION OF THE TRUSTEE FOR THE TIME BEING UNDER A DECLARATION OF TRUST DATED MAY 22, 1968, AS AMENDED AND REVISED, AND ALL PROCEEDS RECEIVED FROM THE SALE OF THE PROPERTY HEREIN MORTGAGED SHALL BE PAID TO THE TRUSTEE FOR THE TIME BEING UNDER THE DECLARATION OF TRUST DATED MAY 22, 1968, AS AMENDED AND REVISED, AND ALL PROCEEDS RECEIVED FROM THE SALE OF THE PROPERTY HEREIN MORTGAGED SHALL BE PAID TO THE TRUSTEE FOR THE TIME BEING UNDER THE DECLARATION OF TRUST DATED MAY 22, 1968, AS AMENDED AND REVISED, AND ALL PROCEEDS RECEIVED FROM THE SALE OF THE PROPERTY HEREIN MORTGAGED SHALL BE PAID TO THE TRUSTEE FOR THE TIME BEING UNDER THE DECLARATION OF TRUST DATED MAY 22, 1968, AS AMENDED AND REVISED.

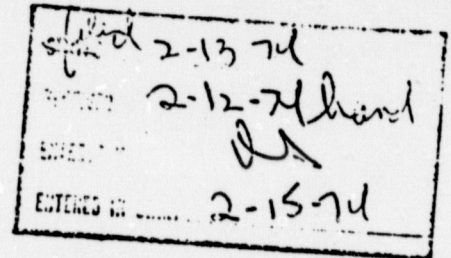
TRUST

513.5555

(Held-out)

702

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



----- x  
: STERLING NATIONAL BANK AND TRUST :  
: COMPANY OF NEW YORK, :  
:

Plaintiff, :

-against- :

FIDELITY MORTGAGE INVESTORS, : 74 CIV 148

Defendant. : (MEF)

NOTICE OF CROSS-MOTION  
TO DISMISS PURSUANT TO  
RULE 12 OF THE FRCP

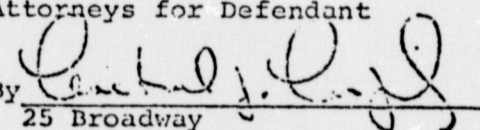
----- x  
S I R S:

PLEASE TAKE NOTICE that upon the annexed affidavit of Kerry B. Fitzpatrick, sworn to on February 8, 1974, and the exhibits appended thereto, and all the proceedings heretofore had herein, the defendant shall cross-move this Court at 10:00 o'clock in the forenoon of February 15, 1974 in Courtroom 2002 of the United States Courthouse, Foley Square, New York, New York, for an order, pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure, dismissing the action herein, granting it its costs and disbursements, and for such other and further relief as the Court may deem just and proper.

Dated: New York, New York  
February 12, 1974

Yours, etc.,

LORD, DAY & LORD  
Attorneys for Defendant

By   
25 Broadway  
New York, N.Y. 10004  
(212) 344-8480

TO:

HARRY GURAHIAN, ESQ.  
Attorney for Plaintiff  
540 Madison Avenue  
New York, New York 10022



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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----  
STERLING NATIONAL BANK & TRUST COMPANY OF  
NEW YORK,

Plaintiff,

-vs-

FIDELITY MORTGAGE INVESTORS,

Defendant.

-----  
STATE OF FLORIDA }  
COUNTY OF DUVAL } S.S.:

AFFIDAVIT  
174 Civ. 148

KERRY B. FITZPATRICK, being duly sworn, deposes and says:

I am the Financial Vice President of Fidelity Mortgage Investors ("Fidelity"), the defendant in this action. As such, I am fully familiar with the circumstances surrounding the issuance of the note which is the subject matter of this action, and of the maintenance of a line of credit by Fidelity at the Plaintiff bank. No part of either transaction took place in New York. Moreover, both the negotiations for the opening of the line of credit and the issuance of the note resulted from specific requests from the Sterling National Bank & Trust Company ("Sterling") to Fidelity in Florida.

Events leading up to the issuance of the Note

My first contract with Sterling arose on March 2, 1972, when I, in Jacksonville, Florida received a telephone call from Irving Gould, Vice President of Standard Financial Corporation, the parent company of Sterling. Mr. Gould inquired as to whether Fidelity would be interested in having a line of credit at the Sterling bank. Attached hereto as Exhibit A is a copy of a letter from Mr. Gould, dated March 2, 1972 confirming this telephone conversation.

A line of credit is in substance an agreement by a bank to agree to lend money to a particular party up to a certain amount upon the request of that party. It in and of itself creates no contractual obligations on either side and is terminable at will by a bank. In most cases, as in this case, a bank requires the party to whom it wishes to extend a line of credit to open an account at its bank up to a certain percentage of the dollar limit or the line of credit.

As a result of my telephone conversation with Mr. Gould, I shortly thereafter had a telephone conversation with Mr. Joseph Sciarillo of Sterling whose name I had received from Mr. Gould. Once again I was in Jacksonville, Florida when this telephone call took place. During this conversation, Mr. Sciarillo and I worked out the terms upon which a line of credit, if it was to be extended, would be based. We agreed that subject to approval of the bank's executive committee the bank would extend a line of credit for \$1,000,000. As to the amounts of the compensating balances, required by Sterling, Mr. Sciarillo agreed to accept Fidelity's standard procedure in like cases of 10% of the line of credit at all times and an additional 10% of borrowings. It was also agreed that all notes would be discounted at the then prime rate. Attached hereto as Exhibit B is a copy of a letter dated March 13, 1972, which I sent to Mr. Sciarillo outlining the agreement which we had reached on the phone. As of the date of this letter, all of the negotiations concerning the line of credit had been completed between Mr. Sciarillo and myself via the telephone.

On March 16, 1972, I received a letter from Mr. Sciarillo advising me that the executive committee would pass on the line of credit the following week.



On March 29, 1972, I was in New York on other business.

Pursuant to prior requests that Mr. Sciarillo had made to me on the telephone to drop in and see him when I was in New York to get acquainted with some of his colleagues, I visited at the offices of Sterling and met Mr. Sciarillo and a Mr. Fowler. The meeting was a social one and no negotiations of any type took place. I was at the bank for approximately an hour, at the most. During that visit Mr. Sciarillo or Mr. Fowler happened to mention that the executive committee of the bank was scheduled to pass on the line of credit the next day. This meeting constituted the only time when I purposely met with anyone from the Sterling bank in New York.

Shortly thereafter I was advised that the line of credit had been approved. Attached hereto as Exhibit C is a letter dated April 7, 1972 from Mr. Fowler of Sterling formally advising us of the approval and confirming the compensating balance deposit, required by the bank, of \$100,000 (10% of the \$1,000,000 line). This is the so-called "checking account" referred to by Mr. Fowler in his affidavit in support of the Summary Judgment Motion (Fowler's affidavit, P.2). All borrowings under this line occurred in the same way, that is, Fidelity would send by mail its non-interest bearing note for the amount from Jacksonville, Florida to the bank in New York. While the notes, including the note which is the subject matter of this action, are by their term payable in New York at the Payee's offices, this provision was not made at the request of Fidelity.

On February 7, 1973, I, in Jacksonville, Florida, again received a telephone call from Mr. Sciarillo. Mr. Sciarillo requested that Fidelity increase its line of credit with the bank from \$1,000,000 to \$2,000,000, and he told me that the bank would like to increase our line of credit to \$2,000,000. At his request, I agreed that Fidelity would increase its line of credit with the bank to \$2,000,000 and, after our conversation, this increase in the line of credit was submitted to the bank's



75A

executive committee, which did approve the increase. Sometime after my conversation with Mr. Sciarillo of February 7, 1973, I was in New York attending a meeting of the shareholders of Fidelity, and I recall that two representatives of the bank did show up at the Fidelity shareholders' meeting. The representatives of the bank had not been invited, but the shareholders' meeting was a public meeting, and based upon my experience, it is not unusual for bankers to attend this type of meeting, especially where they have had business dealings with the Trust. I did, of course, say hello to the bank representatives and they did tell me that the \$2,000,000 line of credit had been approved. There was no plan or intention that I should meet with representatives of the bank at the shareholders' meeting of Fidelity, and we did not negotiate any terms of the line of credit or any loan from the bank at the shareholders' meeting.

Shortly after the line of credit was increased to \$2,000,000, pursuant to Mr. Sciarillo's request, Fidelity mailed to the bank a check to satisfy the increased compensating balance requirement of the bank. Attached hereto as Exhibit D is a letter to me from Mr. Sciarillo acknowledging receipt of the \$100,000 additional deposit dated March 14, 1973.

As of May 21, 1973, Fidelity had two \$1,000,000 notes outstanding to Sterling. On June 12, 1973, both notes were paid in full. Attached hereto as Exhibit E is a letter from Fidelity to Sterling advising them of Fidelity's intention to thus terminate the outstanding debt.

Accordingly, on June 12, 1973, neither party had any contractual obligation to the other and no outstanding debts existed. On that day, I, in Jacksonville, Florida, received another telephone call from Mr. Sciarillo. Mr. Sciarillo asked that we, Fidelity, in 30 days once again borrow money from the bank. This, however, was not done and from June 12, 1973, until the issuance of the note, which is the subject matter of this action, there was no outstanding debt between the parties.

The August 17, 1973 Note

On Tuesday, August 14, 1973, I, in Jacksonville, Florida, received a call from Mr. Sciarillo. He asked me to draw down the entire line. That is, to borrow \$2,000,000. He also requested that the \$200,000 compensating balance be left in a non-interest bearing time deposit in Sterling. Pursuant to Mr. Sciarillo's request I, on behalf of Fidelity, agreed. Accordingly, on August 14, 1973, I caused to be prepared the non-interest bearing note in question dated August 17, 1973, for the face amount of \$2,000,000 due November 7, 1973. This note was discounted at a rate of 9-1/4%. In effect, the discount amount (\$42,138.89) was immediately deducted from the proceeds of the loan leaving a net proceeds to Fidelity of \$1,957,861.00.

However, there was never any agreement, indeed, any discussion of obligating Fidelity to pay interest (of any amount) on the note in the event it was not paid off by the maturity date. Attached hereto as Exhibit F is a copy of a non-interest bearing note dated August 17, 1973, which we mailed from Jacksonville, Florida on August 14, 1973. As will be seen, unlike the copy of the note which the Plaintiff has presented to the Court on numerous occasions, there is no entry on this copy of the "9-1/4" interest term.

*Kerry B. Fitzpatrick*  
Kerry B. Fitzpatrick

Sworn to and subscribed before me  
this 21<sup>st</sup> day of August,  
1974.

*[Signature]*  
Notary Public, State of Florida  
at Large.  
My commission expires:



177.8  
**STANDARD FINANCIAL**  
CORPORATION

277 Park Avenue,  
New York, N. Y. 10017  
Area Code 212-922-4638

IRVING GOULD  
Vice President

March 2, 1972

Mr. Kerry B. Fitzpatrick  
Financial Vice President  
Fidelity Mortgage Investors  
661 Riverside Avenue  
Jacksonville, Florida 32204

Dear Mr. Fitzpatrick:

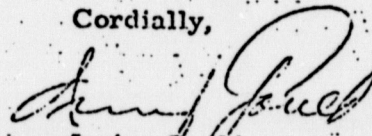
I enjoyed making your acquaintance this date via the telephone.

For your information, please find enclosed herewith the most recent Annual Report of Standard Financial Corporation and Consolidated Statement of Condition of the Sterling National Bank & Trust Company of New York.

We hope we can establish a mutually beneficial relationship with your fine organization.

Kindest regards from my associate, Fred J. Howard, who was instrumental in initiating this relationship.

Cordially,



Irving Gould  
Vice President

IG/eg  
Enclosures

cc: Fred J. Howard



78 a

March 13, 1972

Mr. Joe Sclarillo  
Assistant Cashier  
Sterling National Bank  
1410 Broadway  
New York, NY 10018

Dear Joe:

I am enclosing a Trustees Report for the quarter ended January 31, 1972 and a prospectus dated February 29, 1972. I have also placed your name on our mailing list so that you will receive all future Trustees Reports.

We would like to request that your bank consider a \$1,000,000 line of credit for the Trust. Our current arrangement calls for compensating balances of 10% of the line of credit at all times and an additional 10% of borrowings, which are discounted at the prime rate. We would be able to draw down the line immediately if you so desire.

If you need any further information, please do not hesitate to call.

Sincerely,

KBF:FC  
Enclosures

Sterling National Bank & Trust Company

OF NEW YORK  
1410 BROADWAY AT 30TH STREET  
NEW YORK, N.Y. 10018

79 a

JOHN J. FOWLER, JR.  
SENIOR VICE PRESIDENT

April 7, 1972

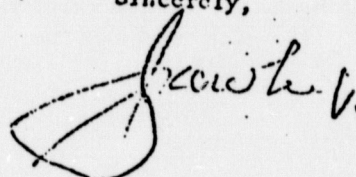
Mr. Kerry B. Fitzpatrick, Financial Vice President  
Fidelity Mortgage Investors  
c/o Fidelity Mortgage Advisors, Inc.  
Post Office Box 4214  
Jacksonville, Florida 32203

Dear Mr. Fitzpatrick:

Thank you for the opening deposit of \$100,000. As you know, our Executive Committee on March 30, 1972, approved a \$1,000,000 line of credit for your fine organization.

We at Sterling are proud to be among your line banks and look forward of being of service to you.

Sincerely,



JJF:ash



**Sterling National Bank & Trust Company**

OF NEW YORK

1410 BROADWAY AT 34TH STREET

NEW YORK, N.Y. 10010

80 a

JOSEPH A. SCIARILLO  
ASSISTANT VICE PRESIDENT

March 14, 1973

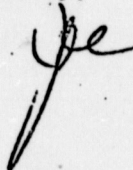
Mr. Kerry B. Fitzpatrick, Financial Vice President  
Fidelity Mortgage Investors  
651 Riverside Avenue  
P. O. Box 4214  
Jacksonville, Florida 32203

Dear Kerry:

Many thanks for sending me the \$100,000 deposit  
representing compensating balances for the increase in the  
line of credit extended to Fidelity Mortgage Investors.

Best regards.

Sincerely,



JAS:FMU

Encl.

Deposit Receipt \$100,000.



May 21, 1973

81 a

Sterling National Bank & Trust Co.  
1410 Broadway at 39th Street  
New York, NY 10018

Attention: Mr. Joseph Sciarillo

Gentlemen:

At maturity, we wish to retire the following note(s) presently outstanding under our line of credit with your bank:

Maturity Date	Note No.	Amount
6/12/73	361	\$1,000,000
6/12/73	386	\$1,000,000

We will instruct Morgan Guaranty Trust Company of New York to bankwire these funds to our account with you on the maturity date.

Please accept this letter as your authority to charge our account in said amount and return the cancelled note directly to us by the next mail. Your assistance in this matter is appreciated.

FIDELITY MORTGAGE INVESTORS

*K. B. Litchfield*  
\_\_\_\_\_  
Authorized Signature

*R. J. Wynn*  
\_\_\_\_\_  
Authorized Signature

THE NAME FIDELITY MORTGAGE INVESTORS IS THE DESIGNATION OF THE TRUSTEES FOR THE TIME BEING UNDER A DECLARATION OF TRUST DATED MAY 30, 1969, AS AMENDED AND RESTATED, AND ALL PERSONS DEALING WITH FIDELITY MORTGAGE INVESTORS MUST LOOK SOLELY TO THE TRUST PROPERTY FOR THE ENFORCEMENT OF ANY CLAIMS AGAINST FIDELITY MORTGAGE INVESTORS AS NEITHER THE TRUSTEES, OFFICERS, AGENTS OR SHAREHOLDERS ASSUME ANY PERSONAL LIABILITY FOR OBLIGATIONS ENTERED INTO ON BEHALF OF FIDELITY MORTGAGE INVESTORS.

c/o FIDELITY MORTGAGE ADVISORS, INC. / BOX 4214 / JACKSONVILLE, FLORIDA 32203 / (904) 358-6200

ONLY COPY AVAILABLE

\$ 2,000,000.00 ..... Boston, Massachusetts ..... August 17  
 On ..... November 7, 1973 ..... for value  
 order of • \*\*\*\*\*Sterling National Bank & Trust Company  
 • \*\*\*\*\*Two Million and No/100\*\*\*\*\*  
 at the New York ..... office of ..... Payee



Fidelity  
 By .....  
 By .....

THE NAME FIDELITY MORTGAGE INVESTORS IS THE DESIGNATION OF THE TRUSTEES FOR THE TIME BEING  
 HEREIN, AS AMENDED AND RESTATED, AND ALL PERSONS DEALING WITH FIDELITY MORTGAGE INVESTORS  
 THE ENFORCEMENT OF ANY CLAIMS AGAINST FIDELITY MORTGAGE INVESTORS AS NEITHER THE TRUSTEES,  
 PERSONAL LIABILITY FOR OBLIGATIONS ENTERED INTO ON BEHALF OF FIDELITY MORTGAGE INVESTORS

FMI-ED

ONLY COPY AVAILABLE



....., 19. 73 No. 432

e received, we promise to pay to the

..... DOLLARS

**Mortgage Investors**

*B. J. J. J. J.*

Authorized Signature

*J. Way*

Authorized Signature

UNDER A DECLARATION OF TRUST DATED MAY 20,  
MUST LOOK SOLELY TO THE TRUST PROPERTY FOR  
OFFICERS, AGENTS OR SHAREHOLDERS ASSUME ANY

822

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

STERLING NATIONAL BANK AND  
TRUST COMPANY OF NEW YORK,

-against-

FIDELITY MORTGAGE INVESTORS,  
Defendant.

Plaintiff,

AFFIDAVIT

STATE OF NEW YORK )

COUNTY OF NEW YORK )

ss.:

SANFORD L. ROTTER, JR. , being duly sworn,  
deposes and says:

That he is over the age of 18 years and resides  
at 348 West 20th Street, New York, New York 10011.

That on the 12th day of February, 1974, at  
4:30 P.M. he personally served a copy of the annexed  
Notice of Cross-Motion to Dismiss Pursuant to Rule 12  
of the FRCP and Affidavit on  
Harry Gurahian, Esq. , the attorney  
for the Plaintiff herein, at No. 540 Madison Avenue,  
New York, New York 10022 , by depositing a copy of said  
Notice of Cross-Motion to Dismiss Pursuant to Rule 12  
of the FRCP and Affidavit enclosed in a  
sealed wrapper directed to said Harry Gurahian, Esq.  
in his office letterdrop, accessible from without said  
office, such office not being open at that time.

Sworn to before me this

13th day of February, 1974.

*Sanford L. Rotter, Jr.*  
SANFORD L. ROTTER, JR.

ROY C. NELSON  
NOTARY PUBLIC, State of New York  
No. 41-6118201  
Qualified in Queens County  
Certificate filed in New York County  
Commission Expires March 30, 1974

17  
76

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

SEYMOUR RUBINOWITZ, Plaintiff,  
COUNTY OF NEW YORK,

Plaintiff,

-against-

THE FIRST NATIONAL BANK OF NEW YORK, INC.,  
Defendant.

FILED  
MAR 24 1964  
CLERK OF COURT  
SOUTHERN DISTRICT OF NEW YORK

AMIRAMIA

77 CIV. 123  
S.D.N.Y.

COUNTY OF NEW YORK )  
: ss.:  
COUNTY OF NEW YORK )

HARRY CURAMIAN, being duly sworn, deposes and says:  
That he is the attorney for the plaintiff in this  
action and makes this affidavit in support of plaintiff's motion  
for summary judgment.

Defendant's claim that deponent misrepresented the  
rate of interest to the Clerk of the Court in entering a default  
judgment is a reckless charge made without any basis in fact  
in an obvious attempt by defendant to somehow delay the entry of  
a judgment against it.

When I prepared the default judgment, I simply looked  
at the bank's records and saw that the interest rate was 2 1/2%  
and I calculated the interest at that rate. Since the record  
disclosed, the rate was 2 1/2% on the loan in full when the  
loan was placed on the bank's books as is explained in the  
affidavit of Anthony Grasso. There is no intention to deceive any



but merely to charge the defendant with the interest it had agreed to pay.

There is no question that there was never any alteration of the note since the notations were not changes but evidenced the agreement of the parties. Nor is there any indication of any fraudulent intent either on the part of the bank's officers, employees or deponent as its attorney.


WHEREFORE, deponent respectfully request that plaintiff's motion for summary judgment be granted.

---

HARRY GURAHIAN

SWORN TO BEFORE ME THIS

14 DAY OF FEBRUARY, 1974

  
Notary Public

-----X  
: \*  
STERLING NATIONAL BANK & TRUST :  
COMPANY OF NEW YORK, : \*  
: \*  
Plaintiff, :  
: \*  
-against- :  
: \*  
FIDELITY MORTGAGE INVESTORS, :  
: \*  
Defendant. :  
: \*  
-----X

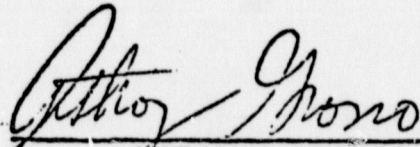
74 Civ. 148  
M.E.F.

The Loan Department has the duty of keeping a record of all loans made at this branch of the bank and to calculate the interest or discount on each such loan. In order to do so, every note is marked with a pencil notation as to the interest rate. In the case of discounted notes, as in the case at bar, both the rate of discount and the dollar amount thereof are routinely marked on the note at the time of discount, In this case August 17, 1973.



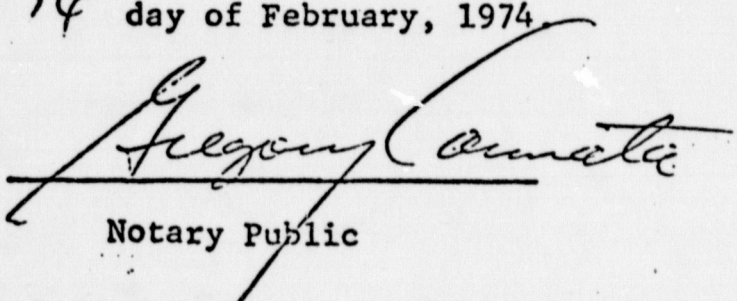
Deponent has examined the note which is the subject of this suit. Said note was under the charge of and in the physical possession of deponent's department when the loan was put on.

On September 14, 1973, the records of this loan were transferred to the main office of the bank at 540 Madison Avenue and at that time the Loan Department of said branch likewise placed a pencil notation of "9 1/4" on the face of the note to the right of the Fidelity Mortgage Investors symbol. A clear copy of the note is attached hereto so that the Court may see the notations to which deponent refers, and the original note is available for inspection by the Court.

  
ANTHONY GROSSO

Sworn to before me this

14 day of February, 1974.

  
Notary Public



21

5.13889

1,600,000  
~~\$2,000,000.00~~ Boston, Massachusetts  
On November 7, 1973  
order of \* \*\*\*Sterling National Ba  
\* \*\*\*Two Million and No/100\*\*\*  
at the New York office of



9/14 090-84255  
11/7/73

THE NAME FIDELITY MORTGAGE INVESTORS IS THE DESIGNATION  
1959, AS AMENDED AND RESTATED, AND ALL PERSONS DEALING  
THE ENFORCEMENT OF ANY CLAIMS AGAINST FIDELITY MORTGAGE  
PERSONAL LIABILITY FOR OBLIGATIONS ENTERED INTO ON BEHALF

FMI-BD

513188

~~1,750 = paid~~

is August 17, 1973 No. 432

....., for value received, we promise to pay to the  
Bank & Trust Company

..... DOLLARS

Payee

Fidelity Mortgage Investors

By

*K. B. Fitzgerald*

Authorized Signature

By

*R. J. Way*

Authorized Signature

OF THE TRUSTEES FOR THE TIME BEING UNDER A DECLARATION OF TRUST DATED MAY 29,  
WITH FIDELITY MORTGAGE INVESTORS MUST LOOK SOLELY TO THE TRUST PROPERTY FOR  
INVESTORS AS NEITHER THE TRUSTEES, OFFICERS, AGENTS OR SHAREHOLDERS ASSUME ANY  
P OF FIDELITY MORTGAGE INVESTORS

88 (Hold-out)

Copy dictated at 12 PM of Feb. 15, 1974  
 H. J. Jacobson  
 atty for def

UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF NEW YORK

STERLING NATIONAL BANK & TRUST  
 COMPANY OF NEW YORK,

Plaintiff,

-against-

FIDELITY MORTGAGE INVESTORS,

Defendant.

SUPPLEMENTAL AFFIDAVIT IN  
 OPPOSITION TO SUMMARY  
 JUDGMENT

74 CIV 148  
 (MEF)

SERVED 2-15-74 *Handwritten*

RECEIVED

FILED 2-15-74 *Handwritten*

SUBMITTED

DOCKET

DIARY

STATE OF NEW YORK )

: ss.:

COUNTY OF NEW YORK )

MICHAEL J. MURPHY, being duly sworn, deposes and says:

I am a member of the Bar of this Court and an associate of the firm of Lord, Day & Lord, attorneys for the defendant herein. I make this supplemental affidavit to respond to certain matters raised for the first time in plaintiff's reply papers served on this office yesterday afternoon, and to bring to the attention of the Court certain matters not heretofore known to the defendant.

The plaintiff apparently is now taking the position that its reliance on the alteration in its ex parte default application was a good faith mistake in that it, a bank (which presumably operates with the various provisions of Article 3 of the UCC every day), understood that it was entitled to post-maturity interest at a 9-1/4 rate since the original discount rate was 9-1/4. Presumably, therefore, the Court is to draw the conclusion that the plaintiff and its counsel were unaware of the provisions of Section 3-122(4) of the UCC and Sections 5003-5004 of the New



York CPLR (see defendant's brief in support of the dismissal motion and in opposition to the plaintiff's summary judgment motion at 25 and 26).

In this regard, yesterday we caused a search of the judgment records in the Supreme Court of the State of New York, County of New York, to be made, in particular, a search of judgments on negotiable notes which had been secured by the plaintiff herein.

Attached hereto as Exhibit A is a copy of the complaint and Statement of Judgment in the default case of Sterling National Bank & Trust Company of New York v. Blackman (Index No. 10919/1973). That case, like the instant case, was a suit on a negotiable promissory note (a copy of which was not in the file) payable on May 1, 1973 in the amount of \$16,500. Since the plaintiff in its complaint, did not state that the note was interest bearing, presumably it, like the instant note, was discounted. As may be seen, the plaintiff's wherefore clause requests the recovery of the principal amount of the note (plus 15% attorneys fees) and, as in the instant case, post-maturity interest. The amount of post-maturity interest requested and recovered was \$291.31 (see Statement of Judgment), which, when calculated for the period of time therein involved, constitutes a rate of 6% as provided for in CPLR §5004. As may be seen, this judgment was entered as recently as August 17, 1973.

Annexed hereto as Exhibit B is a copy of the Judgment, Order and Note in the case of Sterling National Bank & Trust Company of New York v. Construction Payment Corporation, et al. (Index No. 13509/1973). As can be seen from the note, it, like the note in the instant case, was a negotiable instrument for the

payment of a sum certain at a specific date. It was not an interest bearing instrument. Presumably, therefore, it, like the note in the instant case, was also originally discounted at a specific rate. As may be seen from the second ordering paragraph on page 2 of the Order, presumably prepared for the Court by the plaintiff's counsel, the plaintiff requested and was awarded a recovery of post-maturity interest "at the legal rate". While your deponent has not been able to, by computation, arrive at the \$1,026.60 post-maturity interest award shown on the Statement of Judgment, that amount is nevertheless not in excess of 6%.

Attached hereto as Exhibit C is a copy of the complaint and Statement of Judgment in the default case of Sterling National Bank & Trust Company of New York v. Yamin, (Index No. 8678/1972). That was an action on two promissory notes, each in the principal amount of \$20,000. Once again it would appear from the complaint that both were non-interest bearing instruments. The award of interest appearing on the Statement of Judgment (presumably prepared by plaintiff's counsel) constitutes interest at the rate of 7-1/2%, the then judgment rate allowable by the predecessor of CPLR §5004.\*

Despite the fact that in each of the above cases, the plaintiff bank and its counsel, dealing with commercial paper every day, knew what post-maturity interest rate it was entitled to by law, we are now presumably to accept at face value, (without the opportunity for discovery) that for some strange reason in the instant case it made the innocent mistake of assuming it was entitled to post-maturity interest at the original discount rate.

Plaintiff has also submitted an affidavit from Mr. Anthony Grosso, sworn to on February 14, 1974, which states in

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\* Prior to September 1, 1972 the statute provided that interest on judgments ran at the rate established by the N.Y. Banking Board, which in June, 1972 was 7-1/2%.



substance that every note the bank handles is marked with a pencil notation as to the interest rate. As may be seen from Exhibit B above, the note in the case of Sterling v. Construction Payment Corporation, does not bear such an entry.

Annexed hereto as Exhibit D is a copy of a note on file in the Supreme Court of the State of New York in the default case of Sterling National Bank & Trust Company of New York v. New World Products, Inc., et al., (Index No. 15992/1973). This note also, contrary to Mr. Grosso's sworn statement, does not bear a handwritten entry of the interest rate.

Even if Mr. Grosso's affidavit were taken at face value, however, it misses the point. As the defendant's brief on the instant motions points out, even if the alteration was originally made without fraudulent intent, its subsequent fraudulent use by the party who altered it ratifies the alteration and renders it fraudulent (Brief, page 31).

Lastly, we note that the plaintiff makes the continuing claim that the alteration was not material since the parties originally agreed to a discount rate of 9-1/4. This argument completely misses the point. As the Fitzpatrick affidavit makes clear, while the discount rate for the 82 day term of the note was 9-1/4, there was never any agreement or discussion as to post-maturity interest. Nor does the applicable law, which the above discussed cases would indicate the plaintiff was aware of, provide that a holder of a note is entitled to post-maturity interest at an original discounted amount.



Accordingly, it is respectfully submitted that the plaintiff's motion for summary judgment be denied.

Michael J. Murphy  
Michael J. Murphy

Sworn to before me this  
15th day of February, 1974.

Lorraine L. L...

NOTARIAL SIGNATURE  
NOTARY PUBLIC, State of New York  
My Comm. Expires March 30, 1975

IN SENATE  
JANUARY 10, 1973

-----X  
:  
JEROME NATIONAL BANK & TRUST COMPANY \*  
OF NEW YORK, \*  
Plaintiff, \*  
-against- \* COMPLAINT  
PAUL D. BLACKMAN, \*  
Defendant. \*  
-----X

Plaintiff, by its attorney, HARRY GURAHIAN, complaining of the defendant, alleges the following:

FIRST: That at all the times hereinafter mentioned plaintiff was and still is a national banking association organized under the laws of the United States of America.

SECOND: That heretofore and on or about the 13th day of April, 1973, defendant, PAUL D. BLACKMAN duly made, executed and delivered his negotiable promissory note in which he promised, JEROME NATIONAL BANK & TRUST COMPANY OF NEW YORK hereto and thereby he promised to pay to the order of plaintiff the sum of \$10,000.00 on or by 1, 1973.

THIRD: That plaintiff is the owner of the note mentioned herein.



FOURTH: That demand has been made for payment of the principal and interest due on the said note but defendant has failed to make payment thereof.

FIFTH: That no part of said note has been paid and there is now due and owing thereon from defendant to plaintiff the sum of \$16,500.00 plus interest thereon from May 1, 1971.

SIXTH: That defendant agreed under the express terms of said note that in the event of suit thereon it would pay attorney's fees of 15% of the unpaid principal balance and interest due and owing thereunder.

SEVENTH: That in accordance with the provisions of said note there is now due and owing from defendant to plaintiff the further sum of \$2,475.00 as and for attorney's fees.

EIGHTH: That by reason of the foregoing there is now due and owing from defendant to plaintiff the sum of \$13,975.00, together with interest on the sum of \$16,500.00 from May 1, 1973.

WHEREFORE, Plaintiff demands judgment against the defendant PAUL D. BLACKMAN in the sum of \$13,975.00, together with interest on the sum of \$16,500.00 from May 1, 1973, together with the costs and disbursements of this action.

HARRY CERVENI  
Attorney for Plaintiff  
Office S.E.C.  
500 Madison Ave.  
New York, N.Y. 10022



*Index No.*

STERLING NATIONAL BANK & TRUST COMPANY OF NEW YORK,

## Plaisir

against

PAUL D BLACKMAN,

**Disorder**

STATEMENT  
FOR  
JUDGMENT

Amount claimed in Complaint (notice)  
Interest

13,975 | CC  
291.5  
19266 | 39

### Costs by Statute

Service of Summons and ~~\_\_\_\_\_~~

**Aggravated**

### Transcripts and Docketing

**Clerk's Fees entering Judgment**

Postage

### Sheriff's Fees on Execution

### Satisfaction Piece

## Taxing Costs

**Fee for Index Number**

I hereby certify that I have  
 adjusted this bill of costs at  
 \$17.50 AUG 17 1975  
 Norman J. ...

Costs taxed at \$~~750.00~~

### Clerk

Total 19,356.37

## STATE OF NEW YORK, COUNTY OF NEW YORK

**ATTORNEY'S AFFIRMATION**

*The undersigned, attorney at law of the State of New York*

attorney(s) of record for the plaintiff

herein, states that the disbursements above specified are correct and true and have been or will necessarily be made or incurred herein and are reasonable in amount: that the time of the defendant to appear or answer herein has expired and that the said defendant has not appeared or answered herein

The undersigned affirms this statement to be true under the penalties of perjury.

Dated: August 15 1973

**HARRY CURRIAN**

JUDGMENT entered the 17 day of August 19 73

The summons and complaint in this action having been ~~personally~~ served on by substituted service on Paul D. Blackman

the defendant herein and the time of said defendant to appear or answer having expired, and the  
said defendant not having appeared or answered herein

NOW, ON MOTION OF HARRY GURAHIAN  
attorney(s) for the plaintiff it is.

ADJUDGED that STERLING NATIONAL BANK & TRUST COMPANY'S DEEDS, CERTIFICATES

residing at 540 Madison Avenue  
do recover of PAUL D. BLANCHMAN

**the defendant**

residing at 235 1/2 East 73rd Street, New York, N.Y.

the sum of \$19,000.00 the amount claimed with interest with ~~costs~~ <sup>costs and</sup> disbursements, amounting in all to the sum of \$19,353.37 and that the plaintiff have execution therefor.

Plamen Stamen Clerk

ONLY COPY AVAILABLE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

----- x  
STERLING NATIONAL BANK & TRUST COMPANY  
OF NEW YORK,

Plaintiff,

-against-

CONSTRUCTION PAYMENT CORPORATION, LOUIS  
CARDAMONE and LOUIS DE PASQUALE,

Defendants.  
----- x

\* Plaintiff's Address  
: 540 Madison Avenue  
\* New York, N.Y. 10022

\* Defendants' Address  
: 445 Northern Blvd.  
\* Great Neck, N.Y.

The plaintiff, STERLING NATIONAL BANK & TRUST COMPANY OF NEW YORK, having moved for judgment in its favor and against the defendant, CONSTRUCTION PAYMENT CORPORATION and LOUIS DE PASQUALE pursuant to Rule 3212 CPLR, and said motion having duly come on to be heard before Honorable Edward J. Greenfield, a Justice of this court, at IC Part 5 of this court on the 5th day of October, 1973 and an Order having been granted by the said court directing judgment in favor of the plaintiff as herein-after provided and said Order having been duly entered on the 30th day of November 1973,

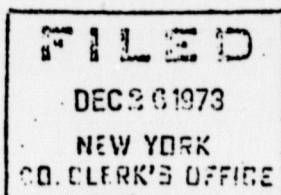
NOW, on motion of HARRY GURANIAN, attorney for the plaintiff, it is

ADJUDGED, that the plaintiff do recover of the defendant, CONSTRUCTION PAYMENT CORPORATION and LOUIS DE PASQUALE the sum of \$23,000.00 together with interest in the sum of



\$1026.50 and costs and disbursements in the sum of \$93.25 making a total of \$24,117.85 and that the plaintiff have execution therefor and the defendant Louis Cardamone having defaulted in answering the summons and complaint the action is severed against him and plaintiff may proceed to enter judgment against defendant Louis Cardamone by reason of his default in answering the summons and complaint.

Judgment entered the 26 day of December, 1973.



*Norman L. Cohen*  
Clerk



At Individual Calendar Part  
5 of the Supreme Court,  
State of New York held in  
and for the County of New  
York, at the Courthouse 60  
Centre Street, New York on  
30th day of November, 1973.

## PRESENT:

HON. EDWARD J. GREENFIELD

Justice

013

----- x  
STERLING NATIONAL BANK & TRUST COMPANY OF \*  
NEW YORK, \*

Plaintiff, \*

-against- \*

CONSTRUCTION PAYMENT CORPORATION, LOUIS \*  
CARDAMONE and LOUIS DE PASQUALE, \*

Defendants. \*

----- x

13509/73

The plaintiff in the above-entitled action having  
made a motion for an order pursuant to Section 3212 of the Civil  
Practice Law and Rules striking out the answer of the defendant  
and granting summary judgment to the plaintiff upon the ground  
that there is no defense to the cause of action alleged in the  
complaint,

NOW, on reading and filing the notice of motion  
dated September 17, 1973 and the affidavit of John J. Fowler.  
sworn to September 17, 1973 in support of said motion and in

papers having been submitted in opposition by the defendants. Construction Payment Corporation and Louis DePasquale and said defendants having defaulted on the return date of the motion and the defendant Louis Cardamone having defaulted in answering the summons and complaint and due deliberation having been had, it is on motion of Harry Gershman, attorney for plaintiff,

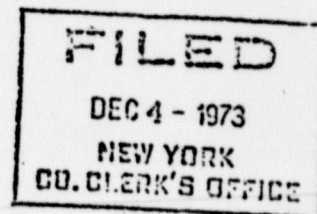
ORDERED, that said motion be and the same is hereby granted in all respects and it is further,

ORDERED, that the plaintiff Sterling National Bank & Trust Company of New York have judgment against the defendants Construction Payment Corporation and Louis DePasquale in the sum of \$23,000.00 together with interest on the sum of \$20,000.00 at the legal rate computed from February 10, 1973 together with costs and disbursements of this action, it is further

ORDERED, that the plaintiff Sterling National Bank & Trust Company of New York may proceed to enter judgment against defendant Louis Cardamone by reason of his default in answering the summons and complaint.

E N T E R

Harry Gershman  
Attorney for Plaintiff  
Office & P.O. Address  
540 Madison Avenue  
New York, New York 10022  
750-3032





SUPREME  
COUNTY OF NEW YORK

STERLING NATIONAL BANK & TRUST COMPANY OF NEW  
YORK,

against

Plaintiff

Index No. 13509/73

STATEMENT  
FOR  
JUDGMENT

CONSTRUCTION PAYMENT CORPORATION, LOUIS CARDAMONE  
& LOUIS DE PASQUALE, Defendants

Amount claimed in Complaint (notice)  
Interest

Costs by Statute  
Service of Summons and Complaint &  
Affidavit  
Transcripts and Docketing  
Clerk's Fees entering Judgment  
Postage  
Sheriff's Fees on Execution  
Satisfaction Piece  
Taxing Costs  
Fee for Index Number

\$ 50 00  
5 00  
8 00  
25 00

\$23,000 00  
1,026. 60  
24,026 60

I hereby certify that I have  
adjusted this bill of costs at  
\$93.25  
JAN 21 1974

Costs taxed at \$ 93.25

Clerk

FILED  
JAN 21 1974  
COUNTY CLERK'S OFFICE  
NEW YORK

Total 93.25 \$ 24,119 85

STATE OF NEW YORK, COUNTY OF NEW YORK

ATTORNEY'S AFFIRMATION

The undersigned, attorney at law of the State of New York

herein, states that the disbursements above specified are correct and true and have been or will necessarily be made or incurred herein and are reasonable in amount; that the time of the defendant to appear or answer herein has expired and that the said defendant has not appeared or answered herein

The undersigned affirms this statement to be true under the penalties of perjury.

Dated: January 4, 1974

HARRY GURAHIAN

JUDGMENT entered the 21st day of January 1974

The summons and complaint

in this action having been personally served on

LOUIS CARDAMONE by substituted service

the defendant herein and the time of said defendant to appear or answer having expired, and the said defendant not having appeared or answered herein

NOW, ON MOTION OF HARRY GURAHIAN  
attorney(s) for the plaintiff it is,

ADJUDGED that STERLING NATIONAL BANK & TRUST COMPANY OF NEW YORK  
the plaintiff

residing at 540 Madison Avenue, N.Y.C.  
do recover of LOUIS CARDAMONE

residing at 20 South Pine Lake Drive, Patchogue, N.Y.

the defendant

the sum of \$24,026.60

the amount claimed with interest with \$93.25

therefor, in all to the sum of \$ 24,119.85 and that the plaintiff have execution

1 22 1359.



\$ 20,000.00 20,000.00 NEW YORK, N. Y. DECEMBER 11, 1972  
 SIXTY DAYS AFTER DATE, FOR VALUE RECEIVED - W E - PROMISE  
 TO PAY TO THE ORDER OF STERLING NATIONAL BANK  
 TWENTY THOUSAND 00/100 DOLLARS  
 AT STERLING NATIONAL BANK 1-777  
 TRUST COMPANY OF NEW YORK 260  
 BROADWAY AT 30TH STREET  
 NEW YORK, N. Y.

VALUE RECEIVED 60  
 NO. DUE 2/9 ACCT. NO. 000-868597  
 F. 1026 DIA AL 10-63  
 4.7122 828 09 000868597

EXHIBIT "A"

102 a

OCT 10 1973  
 RECEIVED  
 100

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

STERLING NATIONAL BANK & TRUST COMPANY  
OF NEW YORK,

Plaintiff,

-against-

ELSA B. YAMIN,

Defendant.

Plaintiff, by its attorney, HARRY CURAHIAN, complaining of the defendant, alleges the following:

FIRST: That at all the times hereinafter mentioned plaintiff, Sterling National Bank & Trust Company of New York (hereinafter referred to as "Sterling"), was and still is a national banking association organized under the laws of the United States of America.

SECOND: That heretofore and on or about February 7, 1972, defendant duly made, executed and delivered her negotiable promissory note in writing to Sterling, wherein and whereby she promised to pay to the order of plaintiff the sum of \$20,000.00 on March 7, 1972.

THIRD: That heretofore and on or about February 9, 1972, defendant duly made, executed and delivered her negotiable promissory note in writing to Sterling, wherein and whereby she promised to pay to the order of Sterling the sum of \$20,000 on March 9, 1972.

FOURTH: That plaintiff is the owner and holder of the notes sued upon herein.

FIFTH: That demand has been made for payment of the principal and interest due on the said notes, but defendant has failed to make payment thereof.

SIXTH: That no part of said note has been paid and there is now due and owing thereon from defendant to plaintiff the sum of \$40,000.00 with interest at the rate of 7-1/2% per annum, from March 7, 1972 on \$20,000 and from March 9, 1972 on \$20,000.

SEVENTH: That defendant agreed under the express terms of said notes that in the event of suit thereon she would pay attorney's fees of 15% of the unpaid principal balance and interest due and owing thereunder.

EIGHTH: That in accordance with the provisions of said notes there is now due and owing from defendant to plaintiff the further sum of \$6,000.00 as and for attorney's fees.

NINTH: That by reason of the foregoing there is now due and owing from defendant to plaintiff the sum of \$46,000.00 with interest at the rate of 7-1/2% per annum, computed from March 7, 1972 on \$20,000.00 and from March 9, 1972 on \$20,000.00.

WHEREFORE, plaintiff demands judgment against the defendant for the sum of \$46,000.00 together with interest at the rate of 7-1/2% computed from March 7, 1972 on \$20,000.00, and from March 9, 1972 on \$20,000.00; together with costs and disbursements of this action.

HARRY GUMHLIN  
Attorney for Plaintiff  
Office and P.O. Address  
1410 Broadway  
New York, N.Y. 10018

WI 7-2062



SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

Index No. E678/1972

STERLING NATIONAL BANK & TRUST COMPANY  
OF NEW YORK,

Plaintiff

against

ELSA B. YAMIN,

Defendant

STATEMENT  
FOR  
JUDGMENT

Amount claimed in Complaint (notice)  
Interest

Costs by Statute  
Service of Summons and  
Affidavits  
Transcripts and Docketing  
Clerk's Fees entering Judgment  
Postage  
Sheriff's Fees on Execution  
Satisfaction Piece  
Taxing Costs  
Fee for Index Number

\$ 25 00  
5 50  
5 00  
25  
10 00

\$ 46,000 00  
333 00

~~46,333 00~~

Costs taxed at \$

Clerk

Total \$ 46,750.75

~~46,333 00~~  
46,750.75

I hereby certify that I have  
adjusted this bill of costs at  
\$ 45.75 JUN 21 1972  
Norman H. Gura  
CLERK

STATE OF NEW YORK, COUNTY OF New York

## ATTORNEY'S AFFIRMATION

The undersigned, attorney at law of the State of New York

attorney(s) of record for the plaintiff

herein, states that the disbursements above specified are correct and true and have been or will necessarily be made or incurred here and are reasonable in amount; that the time of the defendant to appear or answer herein has expired and that the said defendant has not appeared or answered herein

The undersigned affirms this statement to be true under the penalties of perjury.

Dated: June 21, 1972

*[Signature]*  
The name of the attorney must be printed beneath  
HARRY GURAHIAN

JUDGMENT entered the 21<sup>st</sup> day of June 1972.

The summons and complaint

ELSA B. YAMIN by substituted service on April 19, 1972 and proof of service filed on April 21, 1972  
the defendant/ herein and the time of said defendant to appear or answer having expired, and the said defendant not having appeared or answered herein

NOW, ON MOTION OF HARRY GURAHIAN  
attorney(s) for the plaintiff it is,

JUN 21 1972

ADJUDGED that STERLING NATIONAL BANK & TRUST COMPANY OF NEW YORK  
COUNTY CLERK'S OFFICE the plaintiff  
residing at 1410 Broadway, New York, N.Y. 10018  
do recover of ELSA B. YAMIN the defendant

residing at 300 East 40th Street, New York, N.Y. 10016  
the sum of \$ 46,750.75

and that the plaintiff have execution







[illegible]

NEW WORLD PRODUCTS, INC.  
 Ed Gethoff, President  
 P. S. Lusk, Secretary

540 MADISON AVENUE  
NEW YORK, N. Y. 10022

February 15, 1974

Honorable Marvin E. Frankel  
United States District Court  
Foley Square, Room 2002  
New York, New York

Re: Sterling National Bank & Trust Company  
of New York vs. Fidelity Mortgage Inves-  
tors  
74 CIV. 148

Dear Judge Frankel:

This is in response to the affidavit of Michael J. Murphy, Esq. served today at 2:00 p.m. without leave of the Court.

He attaches to his affidavit photocopies of two Sterling National Bank & Trust Company promissory notes claiming that they do not bear a pencil notation as to the interest rate thereby purportedly discrediting the affidavit of Anthony Grosso made on behalf of the bank.

I enclose herewith a clear copy of each of said notes which show that the New World Products Inc. note has the numeral 8 in the upper left hand corner, indicating 8% interest and the Construction Payment Corp. note has the numeral 8 1/2% in the upper left hand corner indicating 8 1/2%. An examination of the copies submitted by Mr. Murphy with his affidavit will show that there is a writing in the upper left hand corner of each of the notes but obviously Mr. Murphy did not take the time to ascertain what that writing was.

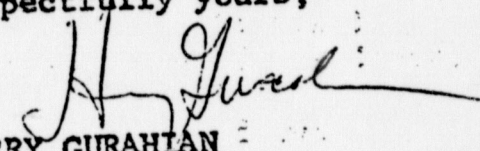
As to his claim that plaintiff entered judgments in Supreme Court New York County with rates of interest of 6% and 7 1/2%, I personally prepared each of said judgments requesting interest at the legal rate existing at that time; namely 7 1/2%

for the Yamin judgment, 8% for the Blackman judgment and 8 1/2% for the Construction Payment Corp. judgment.

It has been my experience that the judgment clerk in Supreme Court, New York County allows the entry of judgments at the higher rate when it is set forth in the addamnum clause of the complaint as in the Yamin complaint. Hence the 7 1/2% interest for Yamin. When the numerical interest rate was not set forth in the addamnum clause (Blackman) or in the order (Construction Payment Corp) the clerk allowed only 6% interest even though the legal rate was higher. Rather than make an issue with the Clerk as to the amount of interest to be awarded on a judgment (which wouldn't be the sum unless collected), I thought it wiser to accede to his point of view and take 6%. This in no way detracts from the statement in my affidavit in this action that I honestly believed (and I still believe) that the interest rate due in this matter is 9 1/4% since the bank's records clearly show that to be the rate.

I also believe that the defendant is trying in every way to forestall the entry of summary judgment since delay is important to it in view of the large sum of money at stake.

Respectfully yours,

  
HARRY GURAHIAN

HG/dm  
Enc.

cc: Lord Day & Lord, Esqs.  
25 Broadway  
New York, N.Y.  
Certified Mail RRR  
Att: Michael J. Murphy, Esq.



One month

TO PAY TO THE ORDER OF

TO PAY TO THE ORDER OF  
Nineteen thousand

AT STERLING NATIONAL BANK  
& TRUST COMPANY OF NEW YORK

[illegible]

VALUE RECEIVED 50

NO. \_\_\_\_\_  
F. 1026 B/A AL-10-68

ACCP NO. 290

4.2222

12667  
NEW YORK, N. Y.

AFTER DATE, FOR VALUE RECEIVED  
STERLING NATIONAL BANK  
& TRUST COMPANY OF NEW YORK

April 30  
-W E-

19

PROM

1-777  
260

100

DOLL

BROADWAY AT 30TH STREET  
NEW YORK, N. Y.

of or contingent, of any maker, indorser or guarantor hereof to the holder hereof shall become immediately due and payable with  
ing specified events with respect to any maker, indorser or guarantor hereof: if any matter, statement, or representation made  
of them or their property, shall be untrue or breached in any respect; calling of a meeting of creditors; assignment for the benefit  
judgment; death; dissolution, making, or sending notice of an intended bulk sale; insolvency; however, if the holder hereof  
r liquidation of their usual business; giving a security interest in or pledge of any property of any of them; failure, after dem  
or hereof, when assessed or due, or if any tax assessment is made by the United States or any state; in any manner by the ho  
New York Civil Practice Law and Rules or amendments thereto be commenced against any of them; or if the condition or ad  
may at any time, without notice, apply the same against payment of this note or such other obligations, whether or not d  
in all property of any maker, indorser or guarantor hereof or the proceeds thereof held or received by or for the holder for  
knowledge or placed in any safe deposit box leased to any maker, indorser or guarantor hereof. Upon the occurrence of any of  
undor proceeds, have the right and remedies of a secured party under the New York Uniform Commercial Code. Notice of sale  
reasonable if mailed postage prepaid to the last known address of the maker, indorser or guarantor appearing on the records  
Each maker, indorser and guarantor agrees that if an attorney is used to enforce or collect this note or such other obligations, the costs  
of 15% of principal and interest due shall be added thereto. Each maker, indorser and guarantor in any litigation, whether or n  
atives trial by jury and the right to introduce any defense based upon any statute of limitations or any claim of law and a  
will be governed by and construed in accordance with the laws of the State of New York. Any provision hereof which may pre  
er provision hereof.

NEW WORLD PRODUCTS INC.

Ed Gottlieb, President

09 01182532 S. L. Smith, Secretary

109 a

IN CONSIDERATION of the credit, discount, loan or extension of time given upon or by the within note to or at the instance of any party thereto, each of the undersigned, by his signature below induces the within note, and, further unconditionally guarantees to the holder hereof, regardless of the genuineness, validity, regularity or enforceability of the within note or of any obligation evidenced thereby, and regardless of any other circumstances whatsoever, that the within note and all other obligations as defined therein will be promptly paid in full when due, in accordance with the provisions thereof, by acceleration or otherwise, hereby consents that the holder hereof may at any time or times and without notice to the undersigned, renew, extend, modify or accelerate pursuant to any agreement with any maker hereof, the maturity or time of payment hereof in whole or in part, and waives all presentment and demands for payment, all protests and all notices of protest or notice of non-payment and all notices of acceptance of this guaranty, and further waives all demands and notices required by any law of the State of New York or otherwise, and all other demands or notices, if any, which the holder hereof might otherwise be required to give to the undersigned at any time in connection with the within note. The liability of the undersigned on this guaranty shall be direct and immediate, and not conditional or contingent upon the pursuit of any remedies against the maker or makers of the within note, or the securities or liens that any holder may possess. This guaranty shall be a continuing guaranty of any and all notes given in extension or renewal of the within note notwithstanding that the original note may have been surrendered, notice of such renewal or extension being hereby waived, and the terms of this guaranty shall apply to said extension or renewal notes. The holder shall have a continuing lien for the amount of all obligations upon any and all property of the undersigned in the actual or constructive possession of the holder or in transit to or from the holder, its correspondents or agents, from or for the undersigned and the proceeds thereof, whether for safekeeping, custody, pledge, transmission, collection or otherwise, or coming into possession of the holder in any way, or placed in any safe deposit box leased to the undersigned. The holder shall have a continuing lien and/or right of set-off for the amount of the within note upon any and all deposits (general or special) and credits of the undersigned with, and any and all claims of the undersigned against the holder at any time existing, and may at any time or times, without prior notice, apply the same, or any part thereof, in or on account of payment of the within note, whether it be due or not. The undersigned agree that whenever an attorney is used to collect or enforce this guaranty, or to enforce, declare or adjudicate any rights or obligations under this guaranty, whether by suit or by any other means whatsoever, an attorney's fee of 15% of the principal and interest then due under this guaranty shall be payable by each of the undersigned against whom this guaranty or any obligation or right hereunder is sought to be enforced, declared or adjudicated. The undersigned, in any litigation in which the holder and any of them shall be adverse parties, waive trial by jury and, the right to interpose any defense based upon any Statute of Limitations or any claim of laches and set-off or counterclaim of any nature or description and agree that this endorsement and guaranty are binding on each of the undersigned their executors, administrators, successors and assigns.

IN WITNESS WHEREOF, the undersigned have signed, sealed and delivered this instrument as of the date set forth on the reverse hereof.

Ted G. Gifford (L.S.)  
John G. Gifford (L.S.)  
[Signature] (L.S.)

383224

ONLY COPY AVAILABLE





**AFTER  
STAY**

TWENTY THOUSAND 00/100

AT STERLING NATIONAL BANK  
A TRUST COMPANY OF NEW YORK

[illegible]

RECEIVED

DUE 10-65

ACCT. NO.

090-8

CONSIDERATION of the credit discount, loan or extension of  
upon or by the within note to or at the instance of any party  
of the undersigned, by his signature below indorses the  
and, further unconditionally guarantees to the holder hereof, the  
the genuineness, validity, regularity or enforceability of the  
of any obligation evidenced thereby, and regardless of the  
whenever, that the provisions therein will be promptly paid in full when due, in  
the holder thereof, by acceleration or otherwise, without  
with any maker, extend, modify or times and all other  
in part, and hereof, the maturity or accelerate pursuant  
and notices of protest or notice of non-payment  
acceptance of this guaranty, and further waives all  
demands or notices, if any, which the holder hereof  
required to give to the undersigned at any time in  
this note. The liability of the undersigned on this  
and immediate, and not the conditional or contingent  
remedies against the undersigned on this note, or  
ties or liens that any maker or makers of the  
guaranty shall have against the undersigned on this  
within note notwithstanding that he original  
hereof, notice of such renewal or extension being  
of this guaranty shall apply to said extension  
or shall have a continuing lien for the amount  
of all property of the undersigned in the actual  
possession, custody, pledge, transmission, collection  
of the undersigned, the holder in any way, or placed  
out for the amount of the within note, or  
of the undersigned and credits of the holder  
at any time or times, without prior notice,  
in or on account of payment of the  
The undersigned agree that of the  
enforce this guaranty, or to enforce,  
or, an attorney's fee of 15% of the  
guaranty shall be payable by each  
party or any obligation or right  
owed or adjudicated. The under-  
signed and any of them shall be  
liable to interpose any defense  
or claim of laches and set-off  
and agree that this endorse-  
ment of the undersigned their executors,  
and have signed  
on the

ed have signed, sealed and  
is on the reverse her-of.

1948

ER DATE, FOR VALUE RECEIVED  
ERLING NATIONAL BANK  
TRUST COMPANY OF NEW YORK

-W E-

PROMISE

DOLLARS

100

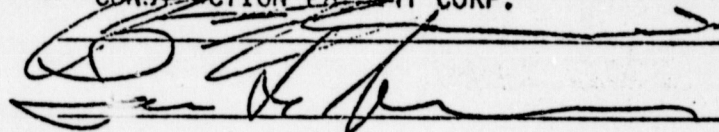
BROADWAY AT 39TH STREET  
NEW YORK, N. Y.

77  
50

ent, of any maker, indorser or guarantor hereof to the holder hereof shall become immediately due and payable without events with respect to any maker, indorser or guarantor hereof: if any matter, statement, or representation made in statement, shall be untrue or incorrect in any respect; selling of a meeting of creditors; assignment for the benefit of their property; filing of a voluntary or involuntary petition under any of the provisions of the Bankruptcy Act or amendments; death; dissolution; leasing, or sending notice of an intended bulk sale; insolvency, however evidenced, or the commission of their usual business; giving a security interest in or pledge of any property of any of them; failure, after demand, when assessed or due, or if any tax assessment is made by the United States or any state; in the event any procedure in Civil Practice Law and Rules or amendments thereto be commenced against any of them; or if the condition or affairs shall increase its credit risk or if it deems itself insecure. The holder hereof shall have at all times a lien on the funds, without notice, apply the same against payment of this note or such other obligations, whether or not due. Any of any maker, indorser or guarantor hereof or the proceeds thereof held or received by or for the holder for any placed in any safe deposit box leased to any maker, indorser or guarantor hereof. Upon the occurrence of any of the proceeds, have the rights and remedies of a secured party under the New York Uniform Commercial Code. Notice of sale or of mailed postage prepaid to the last known address of the maker, indorser or guarantor appearing on the records of er, indorser and guarantor agrees that if an attorney is used to enforce or collect this note or such other obligations for principal and interest due shall be added thereto. Each maker, indorser and guarantor in any illustration, whether or not l by jury and the right to interpose any defense based upon any statute of limitations or any claim of loss and any rmed by and continued in accordance with the laws of the State of New York. Any provision hereof which may prove n hereof.

CONSTRUCTION PAYMENT CORP.

6859710



09 086859

111a



IN CONSIDERATION of the credit, discount, loan or extension of time given upon the within note to or at the instance of any party thereto, each of the undersigned, by his signature below indorses the within note, and, other unconditionally guarantees the holder hereof, regardless of the genuineness, validity, regularity or enforceability of the within note or of any obligation evidenced thereby, and regardless of any other circumstances whatsoever, but the within note and all other obligations as defined therein will be promptly paid in full when due, in accordance with the provisions thereof, by acceleration or otherwise, here- by consents that the holder hereof may at any time or times, and without notice to the undersigned, renew, extend, modify or accelerate pursuant to any agreement with any holder hereof, the maturity or time of payment hereof in whole or in part, and waives all presentment and demands for payment, all protests and all notices of protest or notice of non-payment and all notices of acceptance of this guaranty, and further waives all demands and notices required by any law of the State of New York or otherwise, and all other demands, or notices, if any, which the holder hereof might otherwise be required to give to the undersigned at any time in connection with the within note. The liability of the undersigned on this guaranty shall be direct and immediate, and not conditional or contingent upon the pursuit of any remedies against the maker or makers of the within note, or the securities or liens that any holder may possess. This guaranty shall be a continuing guaranty of any and all notes given in extension or renewal of the within note notwithstanding that the original note may have been surrendered, notice of such renewal or extension being hereby waived, and the terms of this guaranty shall apply to said extension or renewal notes. The holder shall have a continuing lien for the amount of all obligations upon any and all property of the undersigned in the actual or constructive possession of the holder or in transit to or from the holder, its correspondents or agents, from or for the undersigned and the proceeds thereof, whether for safekeeping, custody, pledge, transmission, collection or otherwise, or coming into possession of the holder in any way, or placed in any safe deposit box leased to the undersigned. The holder shall have a continuing lien and/or right of set-off for the amount of the within note upon any and all deposits (general or special) and credits of the under- signed with, and any and all claims of the undersigned against the under- signed at any time existing, and may at any time or times, without prior notice, apply the same, or any part thereof, in or on account of payment of the within note, whether it be due or not. The undersigned agree that when- ever an attorney is used to collect or enforce this guaranty, or to enforce, declare or adjudicate any rights or obligations under this guaranty, whether by suit or by any other means whatsoever, an attorney's fee of 15% of the principal and interest then due under this guaranty shall be payable by each of the undersigned against whom this guaranty or any obligation or right hereunder is sought to be enforced, declared or adjudicated. The under- signed, in any litigation in which the holder and any of them shall be adverse parties, waive trial by jury and, the right to interpose any defense or counterclaim of any nature or description and agree that this endorse- ment and guaranty are binding on each of the undersigned their executors, administrators, successors and assigns.

IN WITNESS WHEREOF, the undersigned have signed, sealed and delivered this instrument as of the date set forth on the reverse hereof.

(L.S.)

(L.S.)

(L.S.)

306056

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

Index No.

STERLING NATIONAL BANK & TRUST  
COMPANY OF NEW YORK,

against

—Plaintiff —  
appellee

AFFIDAVIT OF SERVICE  
BY MAIL

FIDELITY MORTGAGE INVESTORS

Defendant —  
appellant

STATE OF NEW YORK, COUNTY OF New York

SS.:

*The undersigned being duly sworn, deposes and says:*

Deponent is not a party to the action, is over 18 years of age and resides at

36-16 24th Street, Long Island City, New York 11106

That on May 20

19 74 deponent served <sup>2 copies of</sup> the annexed

Appellant's Brief <sup>JOINT APPENDIX</sup>

on Harry Gurahian

attorney(s) for plaintiff-appellee

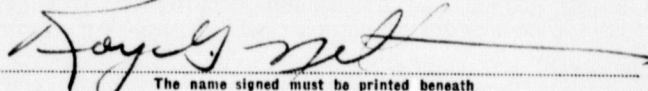
in this action at 540 Madison Avenue, N. Y., N. Y. 10022

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a ~~post office~~—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me

May 20, 1974

Jacob I. Friedman



The name signed must be printed beneath

Roy G. Nelson

JACOB I. FRIEDMAN  
NOTARY PUBLIC, State of New York  
No. 24-6413550  
Qualified in Kings County  
Certificate filed in New York County  
Commission Expires March 30, 1976

Index No.

against

Plaintiff

Defendant

**ATTORNEY'S  
AFFIRMATION OF SERVICE  
BY MAIL**

**STATE OF NEW YORK, COUNTY OF**

ss.:

*The undersigned, attorney at law of the State of New York affirms: that deponent is  
attorney(s) of record for*

*That on*

*19*

*deponent served the annexed*

*on*

*attorney(s) for*

*in this action at*

*the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed  
in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care  
and custody of the United States Postal Service within the State of New York.*

*The undersigned affirms the foregoing statement to be true under the penalties of perjury.*

*Dated*

.....  
The name signed must be printed beneath

**Attorney at Law**